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Criminal Provisions of the Clean Air Act Amendments of 1990  
and Their Interface With  
the United States Sentencing Guidelines

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"Environmental crime is, in fact, dirty white-collar crime . . . and it is always a rip-off."

Richard Thornburgh, Attorney General  
January 1991<sup>1</sup>

## I. Introduction

- The growing severity of our societal response to environmental misconduct is reflected, in part, by the criminalization of environmental wrongs by both state<sup>2</sup> and Federal<sup>3</sup> governments.<sup>4</sup> Indeed, the recently enacted *Clean Air Act Amendments of 1990*<sup>5</sup> continue this trend, giving the Environmental Protection Agency (EPA), via the Department of Justice (DOJ), significant new criminal enforcement tools.<sup>6</sup>

The importance attached to criminal enforcement of environmental laws is a relatively recent phenomenon and took a significant upswing in 1982 when the Department of Justice created what is today the Environmental Crimes Section in what is now the Environment and Natural Resources Division, which section has grown steadily and now has over 25 attorneys who prosecute or assist in the prosecution of environmental crimes in the U.S.<sup>7</sup> Also in 1982, EPA hired its first criminal investigators;<sup>8</sup> by 1987 the number of investigators had grown to 40;<sup>9</sup> by 1990 to 65 (all exercising full law enforcement powers);<sup>10</sup> with further yearly increases mandated by the *Pollution Prosecution*

Act of 1990 to a total of 200 criminal investigators by September 1995.<sup>11</sup> This same Act also directs the establishment by September 1991 of a National Enforcement Training Institute for both state and Federal criminal and civil investigators.<sup>12</sup> Recently, in the *Clean Air Act Amendments* Congress authorized the payment of a bounty of up to \$10,000 for information which leads to the criminal conviction of an air polluter.<sup>13</sup>

Congress' interest in criminal enforcement of environmental laws has not gone unnoticed by the Department of Justice. Richard B. Stewart, Assistant Attorney General, Environment and Natural Resources Division, reports that fiscal year (FY) 1990 was a record year for criminal prosecutions of environmental violators: 134 indictments (a 33 percent increase over FY 1989), a 95 percent conviction rate, and an increase in those actually serving real jail time.<sup>14</sup> Mr. Stewart also reported that he expects to bring many additional cases as a result of the new *Clean Air Act Amendments of 1990*,<sup>15</sup> which is consistent with predictions which preceded their recent passage.<sup>16</sup> While this is but a minor aspect of the some 13,000 administrative civil enforcement actions of EPA and the states in FY 1989,<sup>17</sup> it is still a significant trend given the potentially devastating consequences if one's client happens to be the one facing an indictment.

The United States Sentencing Guidelines (U.S.S.G.) are of less recent vintage than the *Clean Air Act Amendments*, but are no less significant. The U.S.S.G. took effect on November 1, 1987<sup>18</sup> and include a section on "Offenses Involving the Environment."<sup>19</sup> However, it was not until after the 1989 Supreme Court decision in *United States v. Mistretta*,<sup>20</sup> which rejected threshold Constitutional challenges, that prosecutors and judges alike fully accepted the "non-trivial burden" of learning the U.S.S.G. and applying them.<sup>21</sup> Defense counsel in environmental criminal cases who fail to assume this burden will be shocked to find that even a first-time environmental criminal has an excellent chance of being sentenced to a mandatory 12-month term of imprisonment under the U.S.S.G.

It is the interface of these two relatively recent phenomena which will be the focus of this paper. I will identify the principal criminal provisions of the *Clean Air Act Amendments of 1990 (CAA Amendments)* followed by a discussion of the general development and operation of the U.S.S.G., including "Part Q" on environmental offenses. I will next discuss the interface of these two areas concentrating on matters of the greatest potential applicability to the *CAA Amendment* offenses. Before concluding I will examine an ongoing case which demonstrates the challenges presented for prosecutor and defense counsel alike when the

U.S.S.G. are applied to environmental crimes such as those in the CAA Amendments.

While this paper will focus on the interface of the U.S.S.G. with CAA Amendment criminal provisions, experience has shown<sup>22</sup> that environmental crimes are often accompanied by more traditional crimes such as aiding and abetting,<sup>23</sup> conspiracy,<sup>24</sup> false statements,<sup>25</sup> mail and wire fraud,<sup>26</sup> obstruction of administrative proceedings,<sup>27</sup> and perjury.<sup>28</sup> Any contemplation of the interface between the CAA Amendments and the U.S.S.G. will include the impact of these offenses on computation of the sentence range under the U.S.S.G.

"[T]his most excellent canopy, the air, look you, this brave o'erhanging firmament, this majestical roof fretted with golden fire, why it appears no other thing to me than a foul and pestilent congregation of vapors."

Hamlet, Act II, Scene 2<sup>29</sup>

"We will not turn our backs or look the other way. That means polluters must pay."

George Bush, November 15, 1990<sup>30</sup>

## II. Criminal Provisions of the CAA Amendments

### General Legislative History

I will deal with what legislative history exists on the CAA Amendments as necessary to discuss the interface of the criminal provisions with the U.S.S.G. The dearth of legislative history in general is no doubt due in large part to the manner in which the House and Senate bills were reconciled. As one participant described it: "In October it was almost every night to one or two a.m. We were working without a day off from Labor Day."<sup>31</sup> The final Joint Conference compromise was reached at about 5:00 a.m. on Monday, October 22, 1990<sup>32</sup> which compromise loosed what one commentator described as an "800-page tidal wave" on Congress.<sup>33</sup> Complaints that the bill was written by staff and there was not enough time to digest it<sup>34</sup> were answered by such responses as:



Critics are saying that we have received the conference report at the last moments of the session and that we have not had enough time to study its content. Well, . . . this is not the first time conference reports have been delivered right at the wire and it won't be the last. . . . I think we have a good enough idea of what is in it.<sup>35</sup>

Accordingly, Congress passed what it thought was in the CAA Amendments as embodied in the Conference Report. The vote in the House on October 26, 1990 was 401 to 25<sup>36</sup> and in the Senate on October 27, 1990 the vote was 89 to 10.<sup>37</sup> The Conference Report<sup>38</sup> itself had little more than 40 pages of double-spaced explanation, less than one page on the criminal provisions<sup>39</sup> and was described by one of the Senate managers as not particularly useful.<sup>40</sup> It is no surprise, then, that the criminal provisions which are the subject of this paper and were no more than drops in the tidal wave of the CAA Amendments will offer little to slake one's thirst for useful legislative history.<sup>41</sup> This proves the wisdom of the saying "If you like laws and sausages, you should never watch either one being made."<sup>42</sup>

#### Overview of Criminal Provisions

Section 701 of the Clean Air Amendments replaces section 113 of the CAA with a new section 113. References will therefore be to the CAA Amendments section 113 for the current law, since numerous general references to Public Law Number 101-549 section 701 would not be helpful. I

will refer to the CAA section 113 when referring to the superseded law.

In general, the CAA Amendments modernize the criminal provisions of the CAA by incorporating features found in other environmental statutes such as the Clean Water Act (CWA)<sup>43</sup> and the Resource Conservation and Recovery Act (RCRA)<sup>44</sup> which have been updated since the last comprehensive revision of the CAA in 1977.<sup>45</sup> The result is that offenses which were previously misdemeanors are now generally felonies (punishable by imprisonment for more than one year<sup>46</sup> or a fine not to exceed \$250,000,<sup>47</sup> or both) and there are new offenses.<sup>48</sup> Also, a second conviction of any criminal provision doubles the authorized punishment.<sup>49</sup> There was some criticism of these enhanced punishments and new offenses due to a concern that otherwise honest members of the business community would inadvertently violate the law,<sup>50</sup> but such criticism was no doubt muted by CAA Amendment provisions which mitigated the impact of the criminal provisions, primarily through the restrictive definitions, such as for the word "person."<sup>51</sup>

#### General Criminal Provision

Section 113(c)(1) of the CAA Amendments is the general criminal catch-all provision. It provides for imprisonment

for not more than five years or a fine of not more than \$250,000,<sup>52</sup> or both for any person who knowingly violates any requirement or prohibition of

An applicable implementation plan (during a period of federally assumed enforcement or more than 30 days after receiving a notice of violation under section 113(a)(1);

An administrative order issued under section 113(a)(1);

Sections 111(e) (new source performance standards),<sup>53</sup> 112 (hazardous air pollutants), 114 (inspections), 129 (solid waste combustion), 165(a) or 167 (both preconstruction), 502(a) or 503(c) (both permits);

An emergency order issued under section 303;

Title IV (acid deposition control) or Title VI (stratospheric ozone protection);

Including "a requirement of any rule, order, waiver, or permit promulgated or approved under such sections or titles, and including any requirement for the payment of any fee owed the United States under this Act."

By comparison, the predecessor CAA section provid-

ed for imprisonment for not more than one year or a fine of not more than \$25,000 per day of violation, or both, for a less-inclusive list of offenses.<sup>54</sup>

The section 113(c)(1) fee payment provision must, however, be contrasted with section 113(c)(3) of the CAA Amendments which section authorizes imprisonment for not more than one year or a fine of not more than \$100,000<sup>55</sup> for "Any person who knowingly fails to pay any fee owed the United States under this title, title III, IV, V, or VI." The Senate version contained only this section and not the five year/\$250,000 section.<sup>56</sup> The House version contained both sections<sup>57</sup> and was the version ultimately passed.<sup>58</sup> Given the all inclusive language used in both sections, they seem to be irreconcilable; attributable, perhaps to the last-minute haste with which the CAA Amendments were passed. The legislative history is of no assistance; indeed, other than pro forma recitation of the fee provisions, there is only one "pointed reference" to fees and that involved a chiding of Federal facilities for their reluctance to pay them.<sup>59</sup> Given the conflict, the Government will be hard-pressed to avoid ordinary rules of strict criminal construction which should result in the less severe punishment of section 113(c)(3) prevailing.<sup>60</sup>

### Information Offenses

Section 113(c)(2) provides for imprisonment for not more than two years or a fine of not more than \$250,000,<sup>61</sup> or both for any person who knowingly

(A) makes any false material statement, representation, or certification in, or omits material information from, or knowingly alters, conceals, or fails to file or maintain any notice, application, record, report, plan, or other document required pursuant to this Act to be either filed or maintained (whether with respect to the requirements imposed by the Administrator or by a State);

(B) fails to notify or report as required under this Act; or

(C) falsifies, tampers,[sic] with, renders inaccurate, or fails to install any monitoring device or method required to be maintained or followed under this Act.

These offenses not only greatly expand the exposure to potential criminal liability, but increase the punishment over the predecessor CAA provision which authorized imprisonment for not more than six months or a fine of not more than \$10,000, or both.<sup>62</sup>

### Endangerment Offenses

Sections 113(c)(4) and 113(c)(5) of the CAA Amendments provide, respectively, for imprisonment for not more than one year or a fine of not more than \$100,000,<sup>63</sup> or both, for negligent endangerment of another; and imprisonment of

not more than 15 years or a fine of not more than \$250,000<sup>64</sup> for knowing endangerment of another. These sections respectively authorize punishment of any person who knowingly or negligently

releases into the ambient air any hazardous air pollutant listed pursuant to section 112 of this Act or any extremely hazardous substance listed pursuant to section 302(a)(2) of the Superfund Amendments and Reauthorization Act of 1986 (42 USC 11002(a)(2)) that is not listed in section 112 of this Act, and who

at the time negligently places another person in imminent danger of death or serious bodily injury (113(c)(4)), or

knows at the time that he thereby places another person in imminent danger of death or serious bodily injury (113(c)(5)(A)).

These offenses are similar to those already in use in RCRA section 3008(e)<sup>65</sup> and the CWA section 309(c)(3)(A),<sup>66</sup> although neither of these sections contained a negligent endangerment provision.

I now turn to the general development and operation of the U.S.S.G.

"[T]he effectiveness of EPA's criminal enforcement mission . . . is linked to the certainty and severity of criminal penalties that a sentencing court has available."

James Strock, EPA Ass't Administrator,  
Office of Enforcement, February 1991<sup>67</sup>

### III. United States Sentencing Guidelines (U.S.S.G.)

#### General Development and EPA Comment

First of all, why did Congress believe the U.S.S.G. were required? A primary reason was stated by Stephen G. Breyer, Chief Judge, First Circuit Court of Appeals, who was an original member of the U.S. Sentencing Commission:

We all know what happened under the old law. A federal judge would impose a sentence of twelve years. The Parole Commission had the offender serve four years. The judge would think, next time the parole authorities will again say four -- and [the judge] wants this -- but they fool him. They now say eight. . . . [Under the U.S.S.G., t]he sentence the judge imposes is the sentence that will be served.<sup>68</sup>

The U.S.S.G. were promulgated by the U.S. Sentencing Commission, an independent agency in the judicial branch composed of seven voting and two non-voting members.<sup>69</sup> Among other objectives, the U.S.S.G. are designed to further the sentencing purposes of just punishment, deterrence, public protection, and rehabilitation<sup>70</sup> and avoid "unwarranted sentencing disparities among defendants with similar

records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of the general [U.S.S.G.]."<sup>71</sup>

Part of the Sentencing Commission's mandate is to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system."<sup>72</sup> Consequently, the Commission has involved EPA in the development of the U.S.S.G. from the outset.<sup>73</sup> EPA's initial input was limited because the initial draft of the U.S.S.G. did not include separate guidelines for offenses involving the environment.<sup>74</sup>

The October 1986 "Preliminary Draft of the Sentencing Guidelines for United States Courts"<sup>75</sup> did include a chapter 2, part K, entitled "Offenses Involving Public Order" under which was a subsection on "Transportation of Hazardous Materials."<sup>76</sup> However, this subsection dealt with unlawful transportation on aircraft of certain materials which were "hazardous" to safe air travel and therefore violated statutes such as 49 U.S.C. section 1809(b); no criminal environmental law offense was addressed.<sup>77</sup>

However, by January 1987 a separate section on environ-



mental offenses was being circulated within the Government and EPA's earliest comments made clear the agency's

concern that the sentencing process needs to be toughened with respect to environmental crime. The intentional pollution or contamination of this nation's waters, air, and land by toxic substances is as morally reprehensible and detrimental to society's welfare as are acts traditionally labeled as violent crimes. Environmental criminal misconduct entails more than just a failure to comply with administrative regulations or an economic wrong.<sup>78</sup>

In February 1987 the "Proposed Sentencing Guidelines for United States Courts" were published in the Federal Register<sup>79</sup> and included a "Part Q" on "Offenses Involving the Environment."<sup>80</sup> The base offense levels and offense descriptions were substantially what is found in the present U.S.S.G. for environmental offenses.<sup>81</sup> In May 1987 the "Sentencing Guidelines for United States Courts" were submitted to Congress, published in the Federal Register, and automatically took effect on November 1, 1987.<sup>82</sup> This May 1987 version of the U.S.S.G. reflects the favorable reception of many of EPA's earlier comments.<sup>83</sup> By an affirmative vote of four of its members the Sentencing Commission can send amendments to Congress which will take effect not later than 180 days after the submission, except to the extent modified by Congress.<sup>84</sup> The major sections of "Part Q" remain today as they were published in May 1987.<sup>85</sup>

Although detailed coverage is beyond the scope of this paper, the Commission has, since 1988, been developing sentencing guidelines for organizations convicted of Federal crimes.<sup>86</sup> A principal thrust of EPA's comments has been to advocate the availability of probation as a means to insure scrupulous corporate compliance with environmental responsibilities during the term of probation, thus engendering a compliance mindset in the corporation.<sup>87</sup> The DOJ has voiced concern that the guidelines should not require the "time consuming and burdensome" quantification of social and environmental damage caused by corporate polluters as part of the sentencing formula.<sup>88</sup> It appears, however, that the initial set of guidelines, to take effect November 1, 1991, will omit guidelines for environmental crimes.<sup>89</sup>

#### General Operation of the U.S.S.G.

Before discussing the specific U.S.S.G. provisions on environmental offenses, I will present a brief overview of their general operation. The U.S.S.G. try to achieve their goals by first establishing categories of "offense conduct" (which may cover more than one offense), each of which is assigned a numerical base offense level.<sup>90</sup> The count(s) for which a person is convicted will determine what U.S.S.G. section is used to set this base level.<sup>91</sup> Each

offense of conviction may have one or more "offense characteristics" which authorize an upward or downward adjustment of the base offense level.<sup>92</sup> The Government bears the burden of proving by a preponderance of the evidence the facts necessary to support an upward adjustment of the base offense level and the defense bears the same burden for downward adjustments.<sup>93</sup> In meeting this burden, the Government is not limited to the facts underlying the offense of which the defendant has been convicted. The court may consider all "relevant conduct," which includes any acts committed or aided and abetted by the defendant during the commission of the offense of conviction, all acts that were part of the same course of conduct as the offense of conviction, and all harm that was the object of such acts.<sup>94</sup> In short, even if a defendant pleads guilty to one of five counts, the judge will, if consistent with the preceding sentence, be able to consider the conduct underlying all five counts in determining offense characteristics and certain adjustments such as the role of the defendant in the offense.

The "offense characteristics" usually are followed by "commentary" which contains notes on actual application of the guidelines and definitions of terms.<sup>95</sup> Commentary is much like legislative history that helps determine the intent of the drafters,<sup>96</sup> and failure to follow the commentary result in an incorrect application of the guidelines

and cause a reversal on appeal.<sup>97</sup>

After the base offense level for each count is adjusted based on the offense characteristics, further adjustments are authorized<sup>98</sup> based on such factors as the role of the defendant in the offense, obstruction of justice,<sup>99</sup> and the vulnerability or treatment of the victim.

If there are multiple counts of conviction, the U.S.S.G. direct "grouping" of counts "to prevent multiple punishment" for counts that are closely intertwined or involve ongoing behavior.<sup>100</sup> For example, if a defendant is convicted of three counts of illegally discharging toxics from the same facility, the counts would normally be grouped together.<sup>101</sup> The base offense level for the most serious of the grouped counts is then the base offense level for the group.<sup>102</sup> If there is more than one such "group," an upward adjustment is authorized, but this is not a straight addition of base offense levels.<sup>103</sup>

At this point further adjustments are authorized for the individual defendant based on such matters as acceptance of responsibility for the criminal conduct,<sup>104</sup> criminal history,<sup>105</sup> and substantial assistance to the Government.<sup>106</sup> The U.S.S.G. state that race, sex, national origin, creed, religion, and socio-economic status are "not

relevant" in the determination of a sentence.<sup>107</sup> The U.S.S.G. also direct that such matters as age, education and skills, mental and emotional condition, physical condition, employment record and family ties are "ordinarily not relevant" in determining the sentencing range, although they may be relevant in determining the specific sentence within the specified range.<sup>108</sup> This is in marked contrast to pre-U.S.S.G. practice when such factors were a mainstay of defense arguments for leniency.<sup>109</sup>

A final upward or downward adjustment, or "departure," from the adjusted base offense level is authorized if the court makes a finding on the record that there exists "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration . . . in formulating the guidelines" and the court identifies the circumstance(s).<sup>110</sup> This type of departure is sometimes referred to as "unguided" to contrast it with a departure based on "offense characteristics" which give specific guidance for increasing or decreasing the base offense level.<sup>111</sup> An "unguided" departure is subject to review for reasonableness.<sup>112</sup>

The adjusted offense level is used in the U.S.S.G. chapter 5 to determine the "range" of any fine<sup>113</sup> and imprisonment (Sentencing Table at p. 64)<sup>114</sup> within which the U.S.S.G. require that the defendant be sentenced. The

most novel aspect of the U.S.S.G. is the right of the Government to appeal a sentence if, among other things, the sentence was imposed as a result of an incorrect application of the U.S.S.G. or is less than the sentence specified in the applicable guideline range.<sup>115</sup>

Appellate courts must accept factual findings of the sentencing judge unless clearly erroneous, but will fully review the application of the U.S.S.G. for errors of law.<sup>116</sup>

After establishing base offense levels, making upward and downward adjustments on each count, grouping counts, adjusting for matters such as criminal history, making any "unguided" departures, and identifying the sentence "range," the U.S.S.G. give additional rules on such matters as when probation is authorized and when a minimum term of imprisonment is mandatory.<sup>117</sup> As we shall later see, mandatory minimum terms of imprisonment for environmental crimes may be the most controversial aspect of the U.S.S.G.

"Thus shall you purge the evil from your midst, and all Israel, on hearing of it, shall rejoice."

Deuteronomy 21:21

IV. U.S.S.G. Chapter 2, Part Q, "Offenses Involving the Environment"

The U.S.S.G. devote a separate chapter to environmental offenses, which chapter is subdivided into seven sections, each of which lists the statutory provisions to which each offense section will usually be applied. These U.S.S.G. sections and headings are set out below with a listing of base offense levels for comparison. The reader may also wish to refer to the U.S.S.G. Sentencing Table at page 64 to add further perspective to these base offense levels.

2Q1.1: Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants. Base offense level: 24.

2Q1.2: Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification. Base offense level: 8.

2Q1.3: Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification. Base offense level: 6.

2Q1.4: Tampering or Attempted Tampering with Public Water System. Base offense level: 18.

2Q1.5: Threatened Tampering with Public Water System. Base offense level: 10.

2Q1.6: Hazardous or Injurious Devices on Federal Lands. No base offense level is listed, but other U.S.S.G. sections (e.g., drug offenses, property damage, aggravated assault) are incorporated by reference.

2Q2.1: Specially Protected Fish, Wildlife, and Plants; Smuggling and Other Unlawful Dealing. Base offense level: 6.

Of these, only the first three sections will generally be applicable to CAA *Amendment* criminal provisions.

Since the CAA *Amendment* criminal offenses are new, none of the three relevant U.S.S.G. sections explicitly incorporates the offenses. Under such circumstances, the U.S.S.G. direct that the most analogous offense guideline is to be applied.<sup>118</sup> If there is no analogous offense guideline, then "the court shall impose an appropriate sentence."<sup>119</sup>

The general criminal provision, section 113(c)(1), of



the CAA Amendments appears analogous to the provision in the CWA section 309(c)(2)<sup>120</sup> and is, of course, the successor to section 113(c)(1) of the CAA.<sup>121</sup> Both of these sections are listed under U.S.S.G. sections 2Q1.2 (base offense level 8) and 2Q1.3<sup>122</sup> (base offense level 6). Section 2Q1.3 "applies to offenses involving substances which are not hazardous and are not designated as hazardous or toxic,"<sup>123</sup> and section 2Q1.2 applies otherwise. A base offense level of 6 is typically employed by the U.S.S.G. for regulatory offenses, but an offense level of 8 is used for section 2Q1.2 because of the inherently dangerous nature of pesticides and hazardous and toxic substances.<sup>124</sup>

What I call information offenses under section 113(c)(2) have a predecessor in CAA section 113(c)(2)<sup>125</sup> which is listed under both sections 2Q1.2 and 2Q1.3.<sup>126</sup> The distinction is the same as discussed above. Section 2Q1.3 applies to offenses involving non-hazardous, non-toxic substances, and section 2Q1.2 applies to offenses involving hazardous or toxic substances. From just the general criminal offenses and the information offenses, discussed above, one begins to see some of the lines which the U.S.S.G. attempt to draw: a paperwork offense can have an offense level of either 8 or 6 depending on the type of substance involved in the paperwork. The 2-level difference may seem insignificant, but, as we will see, the level

at which a jail term is mandatory under the U.S.S.G. is surprisingly low, and 2 levels can be the difference between probation or imprisonment for at least 12 months.

The fee offense, whether considered under section 113(c)(1) or 113(c)(3) of the CAA Amendments, has no clearly analogous offense in section 2Q. There is no predecessor offense, and it is not uniquely environmental in character except to the extent that it applies to fee payment under an environmental statute. Its seriousness would seem most closely tied to the amount of the fees unpaid, and, unlike recordkeeping offenses, failure to pay a fee for a permit involving hazardous substances does not increase the danger to the public. The most analogous section might therefore be one such as U.S.S.G. section 2F1.1 ("Fraud and Deceit") which provides a sliding scale under offense characteristics to increase the base offense level depending on the amount of money involved.<sup>127</sup> Also, 2F1.1 has a base offense level of 6, which is consistent with the general treatment of regulatory offenses in the U.S.S.G.<sup>128</sup> and section 2Q1.2 and 2Q1.3 offenses in general.

The knowing endangerment offense of the CAA Amendments is both analogous to and fashioned after similar offenses found in RCRA section 3008(e)<sup>129</sup> and the CWA section 309(c)(3)(A)<sup>130</sup> These two sections are listed under U.S.S.G. section 2Q1.1.<sup>131</sup>

The negligent endangerment offense has no predecessor provision nor is it found in other environmental statutes. It is similar to misdemeanor negligent discharge offenses in the CWA section 309(c)(1)<sup>132</sup> which is listed under both sections 2Q1.2 and 2Q1.3; again, depending on the nature of the substance involved. Classification under section 2Q1.1 is inappropriate because that section covers only knowing endangerment and states in its *Background* commentary that "This section applies to offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury" (emphasis added). Likewise, section 2Q1.3 is not appropriate because it "applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic,"<sup>133</sup> and the negligent endangerment offense applies by its terms to releases of "any hazardous air pollutant . . . or any extremely hazardous substance." One is left, almost by a process of elimination, with section 2Q1.2 which deals with "mishandling" hazardous and toxic substances. This section also has an offense characteristic which specifically contemplates an offense which "resulted in substantial likelihood of death or serious bodily injury" and "disruption" of the community.<sup>134</sup>

That section 2Q1.2, with a base offense level of 8, is

the appropriate section to use is supported by reference to U.S.S.G. section 2A1.4 for involuntary manslaughter. This section prescribes a base offense level of 10 if the defendant's conduct was criminally negligent and 14 if the conduct was reckless.<sup>135</sup> On a sliding scale of the harm to society, then, the most analogous U.S.S.G. section seems to be 2Q1.2 with a base offense level of 8.

In order to place the base offense levels for these provisions in perspective, consider the depiction on the following page of base offense levels and corresponding imprisonment ranges for both *CAA Amendment* (in boldface) and other selected offenses:

<u>Offense</u>	<u>Base Offense Level</u>	<u>Prison Range (in months)</u> <sup>136</sup>
18 U.S.C. 1111 <sup>137</sup> (2d degree murder)	33	135-168
113(c)(5)(A) (knowing endangerment)	24	51-63
18 U.S.C. 1153 <sup>138</sup> (burglary-residence)	17	24-30
18 U.S.C. 113(c) <sup>139</sup> (aggravated assault)	15	18-24
26 U.S.C. 7201 <sup>140</sup> (tax evasion-loss of \$20,001-40,000)	10	6-12
15 U.S.C. 1 <sup>141</sup> (bid rigging-\$1 million to \$4 million)	9	4-10
113(c)(1),(2),(4) (offenses involving hazar- dous and toxic substances and pesticides)	8	2-8
15 U.S.C. 78j <sup>142</sup> (insider trading)	8	2-8
113(c)(1),(2) (offenses involving other pollutants)	6	0-6
18 U.S.C. 1001 <sup>143</sup> (false statement)	6	0-6
113(c)(3) <sup>144</sup> (failure to pay fee)	6	0-6

Notes:

1. 113(c)(1) contains the general criminal provision.
2. 113(c)(2) contains the information offenses.
3. 113(c)(4) contains the negligent endangerment offense.

### Anomalies of the U.S.S.G.

What becomes clear is that the U.S.S.G. collect a great many offenses under "umbrella" sections. This is understandable because to be useful the U.S.S.G. must arrive at some compromise between unlimited judicial discretion and mandatory sentences for each statutory offense.<sup>145</sup> This results, however, in offenses with a wide range of maximum statutory punishments having the same base offense level. Whether this is good or bad from a defendant's perspective depends on the gravity of the offense one faces. For example, although we have seen that the *CAA Amendments* had the general effect of elevating misdemeanors to felonies, these new offenses with increased maximum punishments are in the same U.S.S.G. section as their misdemeanor predecessors. Accordingly, computation of the sentence range is generally the same as when an offense was a misdemeanor, except that a longer term of imprisonment may actually be imposed due to the felony-level punishment now authorized. The enhanced punishment levels of the criminal provisions of the *CAA Amendments* narrowed the range of the maximum statutory punishments gathered under the umbrella of a section such as U.S.S.G. section 2Q1.2.

Another example is that, when toxic or hazardous substances are involved, one finds under section 2Q1.2 viola-

tions of the "catch-all" general criminal provision, section 113(c)(1) of the CAA Amendments, which are punishable by imprisonment not to exceed five years or a \$250,000 fine, or both. In the same section is the negligent endangerment provision, section 113(c)(4), with a maximum imprisonment of one year and a maximum fine of \$100,000. Both offenses have a base offense level of 8, although their maximum sentences differ by four years and \$150,000. In theory, the offense characteristics will make appropriate increases or decreases in the base offense level to reflect the differing statutory maximums.

Finally, section 5K1.1, mentioned previously only in passing, permits an unlimited departure from the U.S.S.G. on motion of the Government because of substantial assistance by the defendant in the investigation or prosecution of another.<sup>146</sup> This gives one of the principal "breaks" of the U.S.S.G. only to those most deeply involved in a criminal endeavor.<sup>147</sup> While it may be troubling to some, it is probably the type of incentive needed to secure the assistance that is critical to the investigation of many cases.

#### U.S.S.G. Section 2Q1.2

I now consider in more detail U.S.S.G. section 2Q1.2. I select this section because it contains many provisions

with issues representative of those one will confront when considering the criminal provisions of the CAA Amendments and their interface with the U.S.S.G. The knowing endangerment offenses under section 2Q1.1 are sui generis, and, while not unimportant, should be much less frequently encountered. Section 2Q1.3 parallels section 2Q1.2 in most respects with the primary difference being coverage of less harmful substances. Accordingly, I will examine section 2Q1.2 in some detail. Given the initial contest over the Constitutionality of the U.S.S.G., settled only in the 1989 Supreme Court *Mistretta*<sup>148</sup> decision, "case law guidance is still scarce" to assist in interpreting sections such as 2Q1.2,<sup>149</sup> but 1990 cases have begun to appear in numbers sufficient to provide an outline.

U.S.S.G. section 2Q1.2 is entitled "Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification." Among other things, this section details "offense characteristics," each of which authorizes an increase or decrease in the base offense level, as provided in subsection (b):

(1)(A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by 6 levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.



(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.

Subsection (b)(1) assumes that the discharge results in environmental contamination, and a departure up or down two levels is authorized depending on the harm resulting, nature and quantity of the substance, duration of offense, and associated risk.<sup>150</sup> "Contamination" can occur even if the substance is discovered and cleanup begun one day after the substance was discarded.<sup>151</sup> This does not mean that the Government must prove actual contamination for use of the subsection to be authorized, just that if it does, an upward 2-level departure may be authorized under the applicable subsection in (b)(1) (increase to a total of 8 under (b)(1)(A) and 6 under (b)(1)(B)).<sup>152</sup> If no contamination or contamination of minimal impact is proved, a downward departure will result in the offense

level being increased by only 4 under (b)(1)(A) and 2 under (b)(1)(B). For CAA Amendment offenses, this subsection could prove troublesome from the perspective of proving the nature and extent of any harm. Air pollution in general, even involving hazardous air pollutants, has adverse effects that are typically chronic in nature, and difficult to prove in the short-term.

Subsection (b)(2) is triggered when the public health is seriously endangered.<sup>153</sup> The term "serious bodily injury" is defined as "injury involving extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation,"<sup>154</sup> which parallels much of a definition of the same phrase in section 113(c)(5)(F) of the CAA Amendments: "injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."<sup>155</sup> An upward or downward departure of 3 from the 9-level increase is authorized depending on the on the nature of any risk and the number of people at risk. Once again, proof of harm in CAA Amendment offenses could be troublesome, absent an occurrence similar to that which occurred in Bhopal, India in which thousands of injuries and over 2,000 deaths were clearly attributable to releases

from a specific plant.

Subsection (b)(3), like (b)(1) and (b)(2), authorizes an upward or downward departure from the prescribed 4-level increase depending on the nature of the contamination involved.<sup>156</sup> While it provides no definition of "disruption of a public utility," one case found that proof that a publicly owned treatment work had to spend an "additional \$1,000 to \$10,000" to compensate for the defendant's improperly treated wastewater qualified as "disruption," although the treatment work never actually shut down.<sup>157</sup> Also, it appears that a temporary evacuation of a small number of people can qualify as "evacuation of a community."<sup>158</sup> The phrase "substantial expenditure" for a cleanup is likewise not defined, but one court held that the Government's "six-figure" cleanup qualified as "substantial."<sup>159</sup>

Subsection (b)(4) is fairly self-explanatory and will be triggered in many cases. For CAA Amendment offenses, the "disposal" provision will be most frequently relevant. As with other sections, depending on the risk created by the release, an upward or downward departure of 2 levels is authorized from the specified 4-level increase.<sup>160</sup>

Subsection (b)(5), "recordkeeping" offenses, is to be broadly construed to include failing to submit required reports, giving false information, and failing to maintain records as prescribed.<sup>161</sup> Section 113(c)(2) offenses in CAA Amendments will primarily fall under this section.

Subsection (b)(6), "simple recordkeeping or reporting violation," applies when "the defendant neither knew nor had reason to believe that the recordkeeping offense would significantly increase the likelihood of any substantive environmental harm."<sup>162</sup>

No specific definitions of "toxic" and "hazardous" are provided, since a "listing in the guidelines would be impractical."<sup>163</sup> However, the commentary indicates the definition is to be derived from "substances designated toxic or hazardous at the time of the offense by statute or regulation" and refers to the CWA and CERCLA by way of example.<sup>164</sup> Depending on the offense involved, the expanded section 112 or new sections 113(c)(4) or 113(c)(5) of the CAA Amendments would provide the definition.

V. U.S.S.G. Sections of General Application

Important in all sentence computations for CAA Amendment offenses are adjustments based on U.S.S.G. chapter 3, part B, entitled "Role in the Offense," which applies to a defendant's conduct. Section 3B1.1, "Aggravating Role," authorizes adjustments as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

A "participant" need not have been convicted of the offense, but must otherwise be "criminally responsible."<sup>165</sup> The precise definition of "criminally responsible" is not provided. One court has held that it does not include anonymous tipsters who assist in the environmental crime, but remain unidentified at trial,<sup>166</sup> while another court has held that precise identification of the participants is not required.<sup>167</sup> Also, a criminal organization may be "otherwise extensive" if it used the "unknowing services" of many outsiders,<sup>168</sup> and this has been held to apply to an operator of an illegal

landfill.<sup>169</sup> However, there must be at least one culpable individual other than the defendant so there is a minimal criminal "organization" which is being lead by the defendant.<sup>170</sup> The "Nuremberg" defense of section 113(h) of the CAA Amendments will, to the extent it exonerates heretofore criminally responsible employees or exacerbates proof problems, impair the application of this section to offenses under the CAA Amendments.<sup>171</sup>

The distinction between "organizer or leader" under subsection (a) and "manager or supervisor" under subsection (b) is to be drawn based on factors such as one's degree of control and authority over others, participation in planning an offense, recruitment of accomplices, and decision making authority.<sup>172</sup> With respect to the interplay of subsections (a), (b), and (c), the general thrust of section 3B1.1 is that any adjustment "should increase with both the size of the organization and the degree of the defendant's responsibility."<sup>173</sup>

Section 3B1.2, "Mitigating Role," authorizes a 4-level decrease if the defendant was a "minimal participant" and a 2-level decrease if the defendant was a "minor participant." For cases falling between (a) and (b), a decrease, not surprisingly, of 3 levels is authorized.

As is often the case with the U.S.S.G., definitions of terms are not provided, so the splitting of hairs to determine the difference between "minimal" and "minor" is made more difficult. One is, however, advised that "the downward adjustment for a minimal participant will be used infrequently," and the example provided is of someone recruited as a one-time courier for a small amount of drugs or one who helped with a one-time offloading of a marijuana shipment.<sup>174</sup> Some guidance is also derived from the definition of "more than minimal planning," which "is present in any case involving repeated acts over a period of time."<sup>175</sup> Clearly, this section will only apply to the least culpable defendant involved in a one-time transaction. Any sort of ongoing tampering with monitoring devices or alteration of records will deprive the criminal air polluter of this section's advantages.

Section 3B1.3, "Abuse of Position or Trust or Use of Special Skill," will be of particular significance for CAA Amendment offenses:

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. . . . If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under [sec.] 3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under [sec.] 3B1.1 (Aggravating

Role) (emphasis added).

This section will cast its net widely for CAA Amendment offenses because of the technical demands surrounding air pollution monitoring devices, scrubbers, and self-reporting requirements. "'Special skill' refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include . . . lawyers, doctors, accountants, chemists, and demolition experts."<sup>176</sup> Courts have also interpreted "special skill" to include a counterfeiter who had skills as a printer,<sup>177</sup> and, demonstrating the breadth of the phrase, an extortionist with knowledge of soft drink production methods was held to have the requisite skill, although not acquired by education, training, or licensing.<sup>178</sup> One can readily envision the addition of "environmental engineer" to the list of one with special skills.

"The position of trust must have contributed in some substantial way to facilitating the crime."<sup>179</sup> Not surprisingly, this has been interpreted to include a bankruptcy trustee and a bank official who embezzled funds.<sup>180</sup> However, one's position need not be as grand as these. Also included have been a janitorial service employee who took advantage of his solitary, nighttime duties to "clean out" a bank to a degree not anticipated when he was



hired<sup>181</sup> and a truck driver who stole the cargo entrusted to him by the cargo's owner.<sup>182</sup> One court identifies the crucial fact in such cases as "the extent to which the position provides the freedom to commit a difficult-to-detect wrong."<sup>183</sup> This describes the majority of cases which will involve CAA Amendment offenses. The reliance on self-monitoring and self-reporting places great emphasis on the honest performance of such tasks, and failure to do so may involve at least an abuse of a private trust. For a Government employee, this could be construed to be an abuse of a position of public trust, particularly for someone such as a military officer who, in addition to the job position which may be occupied, takes an oath to support and defend the Constitution.<sup>184</sup> Note, however, that merely possessing a skill or occupying a certain position is insufficient to trigger this section; the skill or position must facilitate the crime.

Section 3C1.1, "Obstructing or Impeding the Administration of Justice," provides: "If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels." Examples of conduct for which this enhancement is appropriate include threatening or coercing a witness or juror, producing false records during an official investigation, destroying or concealing

material evidence (e.g., shredding records after learning of an investigation), providing a false statement to a law enforcement officer, and any obstructive conduct for which there is a separate count of conviction.<sup>185</sup>

Perhaps the "sleeper" provision in the U.S.S.G. is chapter 4, "Criminal History and Criminal Livelihood." Prior CAA Amendment criminal convictions could, of course, be appropriately considered under this section. However, given the predominantly "white collar" nature of environmental crimes, one would think this section to be of minimal relevance, since one envisions the environmental/white collar criminal as a one-time offender.<sup>186</sup> However, civil enforcement actions may come to play a role in the establishment of a "criminal" history under section 4A1.3 of the U.S.S.G. This section permits the sentencing judge to depart from the otherwise established guideline range if reliable information indicates that the defendant's criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct. "Such information may include, but is not limited to, information concerning: . . . (c) prior similar misconduct established by a civil adjudication or by failure to comply with an administrative order; . . . prior similar adult misconduct not resulting in a criminal conviction." The relevant example provided is of "an adjudication in a Securities and

Exchange enforcement proceeding."<sup>187</sup>

The CAA Amendments provide ample opportunity for a business entity to accrue civil judicial and administrative penalties, due to new and expanded programs which will be the subject of enforcement actions,<sup>188</sup> and new or enhanced civil enforcement tools<sup>189</sup> which have due process entitlements ranging from a formal "hearing on the record"<sup>190</sup> to an informal hearing.<sup>191</sup> But how would such civil actions against a corporate entity be attributed to a specific defendant as part of her criminal history? In smaller corporate entities where the defendant is the owner, chief stockholder, or president, the facts of the prior civil action may be such that the imputation of personal responsibility is clear.<sup>192</sup> By one estimate, the CAA Amendments will eventually impose requirements on an additional 143,000 small businesses with estimated initial costs of between \$8,000 and \$22,000.<sup>193</sup> Many of these will have a corporate identity indistinguishable from that of the owner, and the compliance expenses, even if less than the preceding estimate, will not be inconsiderable for some; hence, a sore temptation to just "get by" would increase the potential for civil penalties.

In larger entities, the "responsible corporate officer" doctrine might be retroactively applied, for sentencing purposes, to corporate misconduct to which an

administrative or civil judicial remedy had previously been applied, although this could have daunting, but not insurmountable, evidentiary implications.<sup>194</sup>

The courts have interpreted "criminal" history under this section to include probation revocation, "bad check" writing,<sup>195</sup> a prison disciplinary record, and, incredibly, repeated instances of illegally riding on a trolley.<sup>196</sup>

To protect the record on appeal, a court could announce a finding in the alternative that to the extent such matters do not fall under section 4A1.3, "there exists an aggravating . . . circumstance of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described," and therefore, an unguided departure is warranted.<sup>197</sup> Any departure should ordinarily be to the guideline range for the defendant with the next higher criminal history category.<sup>198</sup>

Note that even if a sentencing judge declines to use such information to increase the defendant's criminal history category, the information might still be used to determine an appropriate sentence within the sentencing range, unless otherwise prohibited by law.<sup>199</sup>

"Recidivist" in the environmental arena could take on an entirely new meaning.<sup>200</sup> All of this could add to corporate officer motivation to contest to the maximum extent the imposition of administrative sanctions. This could, in turn, have the undesirable effect of seriously taxing an already overburdened enforcement effort, which relies predominantly on relatively quick and efficient administrative remedies.<sup>201</sup>

Having examined the development and general operation of the U.S.S.G., including the chapter on environmental offenses under which fall the CAA Amendment criminal offenses, I will now review actual operation of the U.S.S.G. in a specific case. I will examine an ongoing case involving U.S.S.G. section 2Q1.2 in which the sentencing judge is presently reconsidering her sentence upon remand from the court of appeals. The case was tried, the defendant was sentenced, and the appellate process pursued after the Constitutionality of the U.S.S.G. was upheld in *Mistretta*. In the case I will examine the defendant was convicted of one count of violating the *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*,<sup>202</sup> and one count of a non-environmental offense. I did not select a CAA case dealing with the U.S.S.G. to examine simply because there are none of any significance. This is not surprising given the predominantly misdemeanor nature of

CAA offenses prior to the CAA Amendments, the understandable reluctance to expend prosecutorial efforts for minimal returns, and the relatively recent issuance of the *Mistretta* decision.

"I probably shouldn't be saying this but I don't know what the big deal is, we've been doing this for years."

"Nick" Bogas to EPA official,  
March 17, 1988<sup>203</sup>

#### VI. Case Study of Interface

The ongoing case of *United States v. Bogas*<sup>204</sup> provides a good example of how the U.S.S.G. interface with an environmental offense, albeit a CERCLA offense.

Mr. William "Nick" Bogas was the Commissioner of the Cleveland Airport from 1978 until he retired in 1988.<sup>205</sup> He was responsible for daily operations including general maintenance, clean-up, and painting.<sup>206</sup> Based on events at the airport which occurred in March 1988, Mr. Bogas was indicted on five counts and eventually plead guilty to Counts II and V with the remaining charges to be dismissed upon sentencing.<sup>207</sup> Count II charged that Mr. Bogas violated 42 U.S.C. 9603(b)(3) when, on March 10 and 11, 1988, more than one hundred pounds of a hazardous substance were

released into the environment without a Federal permit, and he failed to notify EPA as soon as he had knowledge of this release.<sup>208</sup> Count V charged that Bogas violated 18 U.S.C. 1001 when, on March 15, 1988, he made a false statement to a Mr. Burk of EPA by stating that only eight to ten empty drums, which had previously contained water-based paints, were disposed of in a pit, when he knew that drums containing toluene and other liquid wastes had been buried in the pit.<sup>209</sup>

The indictment centered on a general airport spring cleaning which Bogas initiated. He contracted to have a pit dug and instructed that it was to be filled with debris from around the airport, including concrete, waste fencing, and 55-gallon drums, the last of which caused his problems.<sup>210</sup> Two witnesses testified that on March 11, 1988, the cleanup was discussed at a staff meeting, and in response to concerns about disposal of toluene and EPA regulations, Mr. Bogas replied, in effect, "I'm the EPA at this airport."<sup>211</sup> That same day, a local fire department, the state EPA, and the U.S. EPA each received an anonymous tip that hazardous waste was being buried at the airport.<sup>212</sup> The EPA tip was specifically attributed to an unidentified "worker who was involved in the disposal of the drums."<sup>213</sup>

When a local fireman called Bogas on March 11 and asked

about the alleged dumping, Bogas related that only solid waste was being buried; later that day, Bogas met the fireman and two EPA officials at the pit and said that it contained no 55-gallon drums.<sup>214</sup> At that time only fence posts and broken concrete were visible in the pit, because Bogas had ordered that the pit be covered with dirt each evening.<sup>215</sup> On March 15, Bogas told a Mr. Burk of EPA that only eight to ten empty drums were in the pit (although Bogas knew that around 100 drums had been buried), and as a result of this statement, an EPA investigator canceled a scheduled trip to Cleveland.<sup>216</sup> The pit was later excavated, and on March 30, 1988, Bogas admitted to the FBI that he ordered the drums put in the pit, but denied that he ordered anyone to put drums containing toluene into the pit.<sup>217</sup>

During the year preceding the cleanup, painters generated numerous used paint (oil-based) drums and filled three drums with the waste solvents toluene and xylene.<sup>218</sup> These drums were dumped in the pit and contained paint residue, water, the solvents, and miscellaneous chemicals.<sup>219</sup> Bogas was at the pit several times on March 10 and 11 while the pit was being filled, but he testified at trial that he believed the barrels were empty. Bogas had issued a memorandum in 1982 advising that toluene and xylene were hazardous substances and that EPA must be notified if they



were released into the environment.<sup>220</sup>

In arriving at its sentence, the district court judge first held a sentencing hearing<sup>221</sup> which covered five days and included 23 witnesses and 52 exhibits, after which the Government argued that the court should make an example of Mr. Bogas since he represented the "nation's first hazardous waste violation under the new sentencing guidelines."<sup>222</sup>

In computing the sentence, the judge first "grouped" the two counts (U.S.S.G. sec. 3D1.2(b)) because they involved the same criminal objective and then determined the base offense level of the most serious count (U.S.S.G. sec. 3D1.3(a)), which was the CERCLA offense with a base offense level of eight.<sup>223</sup> The judge then rejected an upward adjustment of four levels which U.S.S.G. section 2Q1.2(b)(1)(b) directs "[i]f the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide." The judge based her rejection on the Government's failure to prove by a preponderance of the evidence that there had been any "contamination" of air, land, or water.<sup>224</sup>

The judge next rejected an increase directed by U.S.S.G. section 2Q1.2(b)(3) "if a cleanup required a substantial expenditure." The presentence investigation recommended an increase of only two levels (rather than the

four levels authorized) because the EPA estimate of cleanup was \$350,000,<sup>225</sup> which the presentence investigation concluded did not qualify as a "substantial expenditure" relative to hazardous waste cleanups in general.<sup>226</sup> The judge concluded, however, that the "only credible evidence presented regarding the cost of actual clean up [sic] as opposed to cost of investigation shows a cost of \$10,300 [based on Bogas' evidence] which is significantly less than the government's estimate."<sup>227</sup>

The judge then considered U.S.S.G. section 2Q1.2(b)(4) which directs an increase of four levels if "the offense involved transportation, storage, or disposal without a permit,"<sup>228</sup> and increased the base level by two levels. The judge disposed of this issue by reference to U.S.S.G. section 2Q1.2, comment (n. 8), which states: "Depending upon the nature and quantity of the substance involved [in subsec. (b)(4)] and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted."<sup>229</sup> The judge then found "that both the quantity and risk involved were so small that an increase of two, rather than four, levels is appropriate."<sup>230</sup>

The judge rejected an enhancement of four levels which U.S.S.G. section 3B1.1(a) directs if "the defendant was an organizer or leader of a criminal activity that involved 5

or more participants or was otherwise extensive." Although the Government argued that Mr. Bogas directed at least ten people,<sup>231</sup> the judge found the Government had failed to prove that any other "participant" was "criminally responsible"<sup>232</sup> as required by U.S.S.G., section 3B1.1, comment (n. 1).<sup>233</sup>

The judge next accepted an enhancement of two levels which U.S.S.G. section 3C1.1 directs if "the defendant willfully obstructed or impeded the administration of justice" (based on his false statement to Mr. Burk). She negated this, however, by adjusting downward two levels which U.S.S.G. section 3E1.1 authorizes if "the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct."<sup>234</sup> In reaching this seemingly contradictory result, the judge "bootstrapped" her position based on a provision not even in effect at the time Mr. Bogas' crimes were committed, U.S.S.G. section 3E1.1, comment (n. 4): "Conduct resulting in an enhancement under 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both 3C1.1 and 3E1.1 may apply."<sup>235</sup> The judge then reasoned that the U.S.S.G. previously "had not adequately accounted for the situation presented here,"<sup>236</sup> apparently relying upon,

without citing, U.S.S.G. sec. 5K2.0 authorizing a departure where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Interestingly, under precisely the same scenario, the Ninth Circuit Court of Appeals recently held that such a retroactive application was precluded by the U.S.S.G.<sup>237</sup>

The district court provided the following summary:

<u>Guideline</u>	<u>Range</u>
Base Offense Level	8
Contamination	0
Cost of Clean up	0
Permit Requirement	2
Leadership Role	0
Obstruction of Justice	+2
Acceptance of Responsibility	-2
Total Points	10 <sup>238</sup>

Consistent with the above, Bogas was placed on probation for four years, ordered to perform 1,000 hours of community service, participate in a home detention program for 180 days and pay for the cost of the program (\$15/day), and pay a \$100.00 penalty.<sup>239</sup> This could hardly be described as the Government's hoped-for stiff penalty for the "nation's first hazardous waste violation under the new sentencing guidelines,"<sup>240</sup> and the Government appealed.

The circuit court opinion<sup>241</sup> found the judge's applica-

tion of two of the U.S.S.G. sections clearly erroneous. The judge erred in applying section 2Q1.2(b)(1)(E), because she required the government to prove "contamination," while the section only requires a "discharge, release or emission."<sup>242</sup> However, the circuit court as much as invited the district court to arrive at the same result in a different manner.<sup>243</sup>

The circuit court also found that although there were "a few soft spots in the government's proof," cleanup costs "came to a six-figure total," and the court concluded that the district court finding that cleanup did not require "substantial" expenditure was clearly erroneous.<sup>244</sup> Accordingly, the offense level should have been increased under U.S.S.G. section 2Q1.2(b)(3).

The circuit court opinion is also revealing for its discussion of facts which the district court either glossed over or omitted altogether. The pit into which the dumping occurred was eight or nine feet deep, 50 feet wide, and 100 feet long, and when workers removed the top layer of dirt, the "stench" prompted EPA to require that a certified hazardous waste operator be engaged; thereafter, each worker had to wear a self-contained breathing apparatus.<sup>245</sup> The excavation of the pit took 11 days during which it rained and some 20,000 gallons of rainwater had to be pumped out of the pit.<sup>246</sup> In short, this case involved

neither a small pit nor a quick cleanup.

### Discussion

Although nowhere discussed in either of the Bogas opinions, the real reason for the contentiousness of the sentencing proceeding seems clear upon examining the U.S.S.G. Sentencing Table (p. 64)<sup>247</sup> and U.S.S.G. section 5C1.1(f). The latter states that if the minimum term of imprisonment in the applicable guideline range is more than ten months, the guidelines require that the minimum term be satisfied by a sentence of imprisonment" (emphasis added). Under the Sentencing Table, an offense level of 13 for Mr. Bogas (with no prior criminal history), would result in a 12 to 18-month sentence and would have required him to serve the minimum term of imprisonment (12 months) "without the use of any incarceration alternatives."<sup>248</sup> The judges, trial and appellate, just seem to have felt that this wasn't "right," regardless of what the U.S.S.G. directed.

The judges no doubt reasoned that Mr. Bogas was a Korean War veteran and had been a responsible citizen during his 34 years of employment for the city of Cleveland.<sup>249</sup> Also, and perhaps more importantly, Bogas was apparently able to "sell" the story that he did not know of the hazardous waste dumping until after the fact and then

foolishly failed to report it and even told a small lie.<sup>250</sup> This despite two witnesses from the March 11 staff meeting who testified that Bogas there brazenly declared "I'm the EPA at this airport."<sup>251</sup> It is unclear whether the court truly accepted Mr. Bogas' story or was willing to represent that it did in order to avoid a mandatory minimum term of imprisonment. But the crucial nature of Mr. Bogas' version of events was highlighted by the appellate court's statement that a downward departure would not be appropriate "if, on further reflection, the [district] court should find that it has any serious doubt about the truth of Mr. Bogas' claim that he never directed his people to take the liquid wastes out of the locked garage and put them in the disposal pit."<sup>252</sup>

The Bogas case illustrates one of the foremost criticisms of the U.S.S.G.: they are too stringent and judges will eviscerate them to avoid sending too many "good" people to jail.<sup>253</sup> With respect to environmental crimes in particular, the imprisonment range has been most controversial because "the ultimate impact of the guidelines is that most first-time environmental offenders will go to jail for a considerable period of time."<sup>254</sup> Or, as one commentator on the S.G. has stated, "One does not have to be bad to do bad when it comes to environmental crimes."<sup>255</sup> Although the U.S.S.G. were, in general, based on past sentencing practices, they enhanced penalties for white-collar crimes

in general, and environmental crimes, such as CAA Amendment offenses, in particular, primarily by mandating that there be less probation and more terms of confinement.<sup>256</sup> In short, EPA got the tougher sentencing it had sought in its comments on the draft U.S.S.G. This enhancement of past sentencing practices is consistent with the Sentencing Commission's statutory direction to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."<sup>257</sup> As the title of one recent article so aptly put it: "Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It Is Hard Time."<sup>258</sup>

As a result of the more stringent approach of the U.S.S.G. to environmental crimes such as those in the CAA Amendments, the Department of Justice in early 1991 noted the following:

[O]ur experience under the guidelines has been that the threat of jail may be a [pretrial] deal-breaker in environmental cases. Defendants are often white-collar criminals for whom the avoidance of jail is the only significant objective. We have therefore experienced an apparent increase in the rate at which our cases are going to trial.<sup>259</sup>

Another ramification noted by DOJ is that "Some sentencing hearings in environmental cases have already begun to resemble full trials."<sup>260</sup> Indeed, Mr. Bogas plead



guilty, but his sentencing hearing covered five days and included 23 witnesses and 52 exhibits.<sup>261</sup> DOJ has issued guidance on the importance of developing "an investigative plan that is structured from the outset with the sentencing guidelines in mind."<sup>262</sup> Among other things, DOJ recommends that such a plan provide for gathering evidence, even if not required as an element of the offense, to prove offense characteristics and other offense level enhancements such as: whether actual contamination occurred, the repetitive nature of any release, careful accounting of cleanup costs, the defendant's role as a leader or organizer in the crime, any special skills (e.g., as an engineer) of the defendant, any obstruction of justice by the defendant, and whether anyone was actually harmed or there was a substantial likelihood for such harm.<sup>263</sup> In sum, knowledge of the U.S.S.G. is important from the beginning of an investigation into or defense of alleged CAA Amendment crimes.

Much of the above seems to have come into play in *United States v. Bogas*: a white-collar criminal trying to avoid jail, a lengthy sentencing hearing covering cleanup costs, questions on culpability beyond the guilty plea of the defendant, and the reluctant judge. All that was missing was the defense on the merits, but we may see more of that in the future.

### Secondary Effects

The secondary effects of a criminal conviction under the CAA Amendments, and other environmental statutes, can motivate a furious defense on the merits because of the potential impacts on one's business future; hence, these impacts bear modest mention. First, the U.S.S.G. themselves provide that a court "may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specified occupation, business, or profession" if there is a reasonably direct relationship between the profession and offense conduct, and if the restriction is reasonably necessary to protect the public.<sup>264</sup> Although the restriction must be "for the minimum time and for the minimum extent necessary to protect the public," it could be disastrous for one whose livelihood has focused in whole or in part on the environmental arena.<sup>265</sup> Also, conviction of an offense under the CAA Amendments can result in a company and its subsidiaries being barred from performing Federal contracts.<sup>266</sup>

Further, some states, such as Ohio, have enacted laws making such convictions a basis for denying environmental permits, which would effectively put one out of business.<sup>267</sup> Finally, and illustrative of the extent to which Congress now views criminal enforcement of environmental laws as *de rigeur*, the Crime Control Act of 1990

adds criminal conviction under many of the major media environmental laws (but not the CAA) as a proper predicate for otherwise appropriate money-laundering sanctions.<sup>268</sup> This can result in fines of \$500,000 or twice the value of the financial transaction, property, or monetary instrument which involved laundered money, whichever is greater.<sup>269</sup> Clearly, such sanctions could sound the death knell for a business.

#### Present Status of United States v. Bogas

A status conference was held on January 28, 1991.<sup>270</sup> In briefs filed in March 1991, the parties have not limited themselves to issues previously discussed in the district or circuit court opinions. The defense seems to realize it has a sympathetic judge and is attempting to provide her with some rationale, any rationale, with which to support a sentence which will not result in mandatory jail time for Mr. Bogas. The Government, by contrast, seems to be trying to keep the focus on the facts and their application to the U.S.S.G.

The sentencing judge has indicated she is considering, and the defense supports, a downward departure based on grounds discussed in the circuit court opinion, i.e., that Mr. Bogas did not direct disposal of the hazardous waste

and then foolishly lied when he found out what had been done. The Government responded by taking the offensive and arguing that not only has the defense failed to meet its burden of proof, but an additional increase of two levels is required by U.S.S.G. section 3B1.3, "Abuse of Position of Trust or Use of Special Skill," because Bogas "used his position as airport Commissioner to obstruct the investigation and conceal the offense, and, also to facilitate its commission."<sup>271</sup>

Newly interjected is that a downward departure might be appropriate based on U.S.S.G. section 5K2.12, "Coercion and Duress," because Mr. Bogas felt that the City of Cleveland compelled him to "handle things" (i.e., CERCLA waste) for which he was not properly trained, managed, or advised.<sup>272</sup> That section provides that the court may decrease the sentence below the sentencing range "[i]f the defendant committed the offense because of serious coercion . . . or duress, under circumstances not amounting to a complete defense." The Government responded by pointing out that the only coercion Mr. Bogas could have felt was economic (i.e., loss of his job) and section 5K2.12 "makes clear that economic, financial, and business pressures are insufficient. . . . Moreover, such pressures are not supported on the record."<sup>273</sup>

The defense also raised double jeopardy, due process,

and Eighth Amendment issues, none of which were mentioned in the remand by the Sixth Circuit Court of Appeals and which merit no further discussion. The Government's philosophy is summarized in one of its brief as follows:

What we have here is an older defendant with a history of career achievements and social relationships with high ranking politicians<sup>274</sup> and judges who has no prior criminal record. This is not unusual for environmental criminals.

Bogas urges this Court to ignore the sentencing guidelines. . . . Whether we agree that pollution ought to be a crime, or that hazardous waste pollution ought to be a jail offense, is irrelevant. Whether we agree that jail time will deter polluters where civil remedies fail is irrelevant. The legislative and executive branches of government have already determined these matters. The offense levels are set where they are because people and the environment are being hurt by this type of activity. laws of the United States clearly require that the defendant go to jail.<sup>275</sup>

The Government concluded by stating that "The laws of the United States clearly require that the defendant go to jail. We ask for a sentence within the guideline range for offense level 16."<sup>276</sup> An offense level of 16 would require that Mr. Bogas serve at least 21 months in jail.<sup>277</sup> The final brief was filed March 26, 1991<sup>278</sup> and the parties now await the judge's sentence.<sup>279</sup>

"If the law supposes that, the law is  
a ass -- a idiot."

Mr. Bumble in Oliver Twist<sup>280</sup>

## VII. Conclusion

The initial study of practice under the U.S.S.G. concluded that some (certainly a minority) prosecutors as well as judges still try to arrive at a sentence primarily according to some pre-U.S.S.G. concept of what is "right" for a particular offense.<sup>281</sup> This ignores the Congressional purpose embodied in the U.S.S.G. which seeks to minimize the role of personal concepts of sentence appropriateness. Nevertheless, both prosecution and defense must arm themselves to do battle in which the rules of engagement are prescribed by the U.S.S.G., regardless of whether a judge is hostile to or in agreement with the them.

Knowledge of the U.S.S.G. is particularly important with respect to the newest offenses in the *CAA Amendments*, for as *Bogas* demonstrates there is still ferment concerning the seriousness with which such crimes should be treated. Offenses such as those in the *CAA Amendments* provide a necessary deterrent punch, but the offenses are only half of the equation. Without adherence to the U.S.S.G., convictions will be robbed of their impact on the regulated community, not to mention the individual defendant. There

are still judges, such as in *Bogas*, who will make whatever stretches are required to avoid putting an environmental offender in jail, believing that confinement is reserved for those with nicknames like "the Butcher" or "the Cannibal." Prosecutors and defense counsel alike will poorly serve their respective clients if they fail to struggle with the interstices of the interface between the U.S.S.G. and crimes such as those in the *CAA Amendments*. A storm approaches the environmental community; its potential fury evidenced by the 1990 observation of the Council on Environmental Quality:

[F]elony prosecutions of environmental crimes stand out as the major change in environmental enforcement over the past 20 years. A growing public reaction to those who knowingly damage the environment and endanger human life has been reflected in tougher enforcement provisions in environmental laws. Misdemeanors have been raised to felonies. Million-dollar fines are no longer uncommon, and corporate executives serve jail terms for knowing violations of the law.<sup>282</sup>

I agree with the U.S.S.G. that environmental offenses such as those in the *CAA Amendments* are indeed serious crimes. They are crimes which are hard to detect,<sup>283</sup> insidious in their gradual, long-term adverse impact, and potentially disastrous in their consequences for the environment and unknowing innocents. Indeed, ignored by both opinions in *Bogas* was testimony that during the disposal operation airport workers at the pit got headaches from

fumes and one who was splashed in the face had eye, skin, and breathing problems and coughed blood.<sup>284</sup> It is precisely the Mr. Bogases of this world who will be in a position to commit such offenses -- those of otherwise impeccable background save for a willingness to poison the environment and unknown fellow humans when it is convenient to do so. I commend to recalcitrant judges the words of Oliver Wendell Holmes: "Judges are apt to be naif [sic], simple-minded men. We too need education in the obvious -- to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with . . . by the orderly change of law."<sup>285</sup>

I also offer the simple truth uttered by one Alphonse Capone: "You can get much further with a kind word and a gun than with a kind word alone."<sup>286</sup> The U.S.S.G. provide the "gun" needed to get and keep the attention of would-be polluters for whom a "kind word" will not suffice.

"They think to beguile Allah and those who believe and they beguile none save themselves; but they perceive not."

Koran, Surah II:9<sup>287</sup>

And yet . . . , the world is more complicated than the good versus evil themes in which one would prefer to cast one's characters. The future of this planet hinges on the manner in which we manage our environment, if such a thing



is possible. There is much that should be done regarding transportation, lifestyles, energy policy, and consumption, but the body politic does not presently support required remedies. The criminal provisions of the CAA Amendments and the U.S.S.G. provide actual tools with which something can be done. There has been much tough talk, a cynic might call it posturing, out of the Executive and Congress about environmental criminals going to jail. It will be interesting to see how long it takes to alter the U.S.S.G., in substance or application, if the people who contribute to campaign funds in this country truly are troubled by the prospect of the "Nick" Bogases of this world going to jail. Indeed, a sense of dark foreboding accompanies the recent failure of the Sentencing Commission to include environmental crimes in its organizational sentencing guidelines.<sup>288</sup>

If change does ensue, it will be instructive to see how it is implemented. Congress probably won't weaken environmental laws such as the CAA Amendments because that would be too visible and would put a crimp in the posturing potential of its members; it also would require a degree of organization and forthrightness that Congress has not recently demonstrated. Congress could however do what it does so well -- exert discrete pressure on the Department of Justice and the Executive to alter the manner in which the U.S.S.G. are applied, in general, or in specific cases.

Perhaps similar pressure could be exerted on members of the Sentencing Commission in order to effect subtle, yet important changes in the U.S.S.G. As we have seen, the U.S.S.G. is a rather intricate and, in many ways, seamless web: a little more discretion for the judge here, some seemingly inconsequential commentary softened up there, and maybe a little leeway on some of those factors like age, education, and ties to the community. It wouldn't take much, and it could certainly be limited to environmental or white collar crimes -- Congress would want to be careful that the "real" criminals don't get any of the breaks which rightfully belong to a caring fellow like Mr. "I'm the EPA at this airport" Bogas. Underlying Congressional pressure on the Sentencing Commission would be the reality that Congress created the Commission and, well . . . changes are always possible and funding is always a difficult issue in these austere times. Once again, an outright repeal of the enabling legislation would be much too crude, although perhaps it could be sold as a cost-cutting measure.

The only difference between a terrorist who indiscriminately shoots into a crowd and a polluter like Mr. Bogas is the instrument of death and the immediacy of its effect. The enhanced criminal penalties and new criminal offenses in the CAA Amendments are important symbols of our country's commitment to protection of its citizens and the environment. However, they will remain only symbols full of

promise if the U.S.S.G. are eviscerated.

## SENTENCING TABLE

(in months of imprisonment)

### Criminal History Category (Criminal History Points)

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6
2	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6	1 - 7
3	0 - 6	0 - 6	0 - 6	0 - 6	2 - 8	3 - 9
4	0 - 6	0 - 6	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 6	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	4 - 10	6 - 12	10 - 16	15 - 21	18 - 24
9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24	21 - 27
10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27	24 - 30
11	8 - 14	10 - 16	12 - 18	18 - 24	24 - 30	27 - 33
12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33	30 - 37
13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37	33 - 41
14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41	37 - 46
15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46	41 - 51
16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51	46 - 57
17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57	51 - 63
18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63	57 - 71
19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71	63 - 78
20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78	70 - 87
21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87	77 - 96
22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96	84 - 105
23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105	92 - 115
24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115	100 - 125
25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125	110 - 137
26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 137	120 - 150
27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150	130 - 162
28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162	140 - 175
29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175	151 - 188
30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235
32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262
33	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293
34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	360 - life
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	360 - life
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	360 - life
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	360 - life
41	324 - 405	360 - life	360 - life	360 - life	360 - life	360 - life
42	360 - life	360 - life	360 - life	360 - life	360 - life	360 - life
43	life	life	life	life	life	life

November 1, 1990

Thesis Footnotes

(1) *Thornburgh Challenges Prosecutors to Stem Vandalism of "Blue Planet,"* [21 Current Developments] *Env't Rep.* (BNA) 1657 (Jan. 11, 1991) (remarks to 1991 Environmental Law Enforcement Conference in New Orleans).

(2) *E.g. Termini, Enactment of Environmental Legislation and Enforcement Through Criminal Sanctions: Pennsylvania as a Role Model,* 9 *Temp. Env'tl. L. & Tech. J.* 51 (1990); *Gunther, Enforcement in Your Backyard: Implementation of California's Hazardous Waste Control Act by Local Prosecutors,* 17 *Ecology L. Q.* 803 (1990); *Humphrey, The Federal and State Roles in Environmental Enforcement,* 14 *Harv. Env'tl. L. Rev.* 7 (1990).

(3) *Leon, Environmental Criminal Enforcement: A Mushrooming Cloud,* 63 *St. John's L. Rev.* 679 (1989); *Allan, Criminal Sanctions Under Federal and State Environmental Statutes,* 14 *Ecology L. Q.* 117 (1987); *Starr, Countering Environmental Crimes,* 13 *B. C. L. Rev.* 379 (1986).

(4) That such a trend is not universal is demonstrated by Canada's *Criminal Code*. Despite a 1985 recommendation by the Law Reform Commission of Canada (LRCC) (a federal entity), the Code still has no distinct crime for environmental wrongs. LRCC, Crimes Against the Environment (Working Paper 44) (1985); *Linden, Recodifying Criminal Law,* 14 *Queen's L.J.* 3, 12-13 (1989).

(5) *Pub. L. No. 101-549, 104 Stat. 2399* (1990).

(6) *Id.* at 104 Stat. 2672-80, sec. 701.

(7) *Dept. of Justice, 1 Environmental Crimes Manual* I-3 (1990).

(8) *Council on Environmental Quality, 1989 Environmental Quality Report* 153 (1990).

(9) *Letter from Thomas L. Adams, Jr., EPA Ass't. Admin., Office of Enforcement, to William W. Wilkins, Jr., Chmn., U.S. Sentencing Commission* (Mar. 13, 1987) (available in EPA Office of Criminal Enforcement).

(10) *Letter from James M. Strock, EPA Ass't. Admin., Office of Enforcement, to William W. Wilkins, Chmn., U.S. Sentencing Commission* (Feb. 9, 1990) (available in EPA Office of Criminal Enforcement).

(11) *Pub. L. No. 101-593, 104 Stat. 2962, sec. 202(a)(5)* (1990) (interim increases: Sept. 91 = 72 investigators;

Sept. 92 = 110; Sept. 93 = 123; Sept. 94 = 160).

(12) *Id.* at sec. 204.

(13) Pub. L. No. 101-549, 104 Stat. 2679, sec. 701 (1990) (adding sec. 113(f) to the Clean Air Act).

(14) 1990 Record Year for Criminal Enforcement of Environmental Violators, Justice Announces, [21 Current Developments] Env't Rep. (BNA) 1397 (Nov. 23, 1990).

(15) *Id.*

(16) More Prosecutions Under New Air Bill Predicted by Justice Department, EPA, [21 Current Developments] Env't Rep. (BNA) 421 (Jun. 29, 1990).

(17) U.S. Environmental Protection Agency, Enforcement Four-Year Strategic Plan: Enhanced Environmental Enforcement for the 1990's 2-3 (attached to Memorandum from James M. Strock, EPA Ass't Administrator for Enforcement, same subject (Oct. 17, 1990) (citing "over 4,000 administrative actions in FY 1989" by EPA and state administrative actions of between 8,700 and 9,300 per year since 1987)).

(18) United States Sentencing Commission, Guidelines Manual ch. 1, part A, intro. comment (2) (1990) [hereinafter cited as U.S.S.G.].

(19) *Id.* at ch. 2, part Q.

(20) *United States v. Mistretta*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (upheld against challenges based on nondelegation and separation-of-powers arguments).

(21) Nagel & Schulhoffer, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L.R. 231, 257-58 (1989).

(22) Dept. of Justice, 1 Environmental Crimes Manual I-10 (1990).

(23) 18 U.S.C. sec. 2 (1988).

(24) 18 U.S.C. sec. 371 (1988).

(25) 18 U.S.C. sec. 1001 (1988).

(26) 18 U.S.C. secs 1341 and 1342 (1988), respectively.

(27) 18 U.S.C. sec. 1505 (1988).

(28) 18 U.S.C. secs. 1621-23 (1988).

(29) Reprinted in Franklin Library, William Shakespeare Selected Plays 210 (1981).

(30) Remarks on Signing the Bill Amending the Clean Air Act, 26 Weekly Comp. Pres. Doc. 1823 (Nov. 15, 1990).

(31) Edelson, *A Win for Clean Air*, 8 *The Env'tl. Forum* 10, 15 (Jan./Feb. 1991) (quoting Ernest Rosenberg, lobbyist for Occidental Petroleum).

(32) 136 Cong. Rec. S17245, S17255 (daily ed. Oct. 26, 1990) (respective statements of Sen. Baucus and Sen. Simpson).

(33) Lavelle, *The fight over the new Clean Air Act was just the start*, *The National Law Journal*, Nov. 12, 1990 at 27, col. 1.

(34) E.g., 136 Cong. Rec. S17430, S17432 (daily ed. Oct. 27, 1990) (statement of Sen. McClure: "Who among us is willing to tell constituents 'I did not vote for the Clean Air Act because I don't know what is in it.'").

(35) 136 Cong. Rec. S16993 (daily ed. Oct. 27, 1990) (statement of Sen. Ford); "perfect is the enemy of good," *Id.* at S16994 (statement of Sen. Bentsen).

(36) 136 Cong. Rec. H12943 (daily ed. Oct. 26, 1990) (six not voting).

(37) 136 Cong. Rec. S18264 (daily ed. Oct. 27, 1990) (one not voting).

(38) *Clean Air Act Amendments of 1990 Conference Report to Accompany S.1630*, H.R. Rep. No. 592, 101st Cong., 2d Sess. (1990) [hereinafter cited as *Conference Report*], reprinted in 1991 U.S. Code Cong. & Ad. News 3867-3887.

(39) *Id.* at 347-48.

(40) 136 Cong. Rec. S16933 (daily ed. Oct. 27, 1990) (statement of Sen. Baucus).

(41) 136 Cong. Rec. E3714 (daily ed. Nov. 2, 1990) (extension of remarks by Rep. Dingell):

The regulated community, the [EPA], environmentalists, and others may have preferred that the managers or conferees spell out in greater detail our intent and our interpretations in order to make their tasks simpler administratively and in the courts. However, the House and Senate conferees did not share that view. Efforts on our part to try

to provide such interpretations or explanations . . . probably would have taken a considerable amount of time. That did not seem wise, particularly in light of the lateness of this session of the 101st Congress.

(42) Otto von Bismarck quoted in Congressional Research Service, Respectfully Quoted 190 (1989).

(43) 33 U.S.C. secs. 1251 to 1387 (1988).

(44) 42 U.S.C. secs. 6901 to 6992k (1988) (also called the *Solid Waste Disposal Act*).

(45) 136 Cong. Rec. S16951 (daily ed. Oct. 27, 1990) (Chaffee-Baucus Statement of Senate Managers); *Clean Air Act Amendments of 1989: Report of the Committee on Environment and Public Works*, S. Rep. No. 228, 101st Cong., 2d Sess. 361-62 [hereinafter cited as Senate Report], reprinted in 1991 U.S. Code Cong. & Ad. News 3385-3795 (with minority views at 3796-3866).

(46) 18 U.S.C. 3581(b)(5) and (6) (1988).

(47) 18 U.S.C. sec. 3571(b)(3) (1988).

(48) Conference Report, *supra* note 38, at 35.

(49) CAA Amendments secs. 113(c)(1) thru (c)(5).

(50) E.g., 136 Cong. Rec. S16886 (daily ed. Oct. 27, 1990) (statement of Sen. Symms: "criminal sanctions, Mr. President, criminal sanctions for paperwork errors, recordkeeping errors, and other omissions"); Senate Report, *supra* note 45 at 488 (minority view).

(51) E.g., section 113(c)(5)(B) (proof of knowledge for knowing endangerment), 113(c)(5)(C) (for knowing endangerment: affirmative defense if, under some circumstances, conduct freely consented to), and, most significantly, 113(h) (definition of "person" often excludes employee carrying out normal duties and is limited to "senior management personnel;" defense of carrying out orders--"Nuremberg" defense--provided under certain circumstances). Discussed *infra* at note 171.

The apparent focus on "senior management personnel" seems to run counter to modern management theory which attempts to emphasize participation of low-level employees in the decisionmaking process, Lipsky, *Participatory Management Schemes, the Law, and Workers' Rights*, 39 Am. U.L. Rev. 667, 673 (1990), which has been adopted in some form by over 80 percent of the Fortune 1000 business firms. See

Turnbull, *The Limits to Japanisation: Just-in-Time, Labour Relations and the UK Automotive Industry*, 3 New Tech., Work, & Employment 7, 14 (Spring 1988). Employee representatives even serve on boards of directors today. McCormick, *Union Representatives as Corporate Directors*, 15 U. Mich. J.L. Ref. 219 (1982).

"When our lawyers cannot understand our [businessmen] and our [businessmen] cannot understand our lawyers, . . . how can they serve well the enterprise we call America?" *Symposium on Law-Science Cooperation Under the National Environmental Policy Act*, 15 Nat. Res. Lawyer 570, 620 (1983) (paraphrase of quote from Judge Markey).

(52) The section reads "punished by a fine pursuant to Title 18." 18 U.S.C. sec. 3571(b)(3) lists the fine for one convicted of a felony as not to exceed \$250,000. 18 U.S.C. sec. 3581(b)(5) lists as a felony any offense for which a prison term of one year or more may be imposed. Cf. 18 U.S.C. sec. 3571(d) which permits an alternative fine of not more than twice the defendant's gross pecuniary gain from an offense or twice the gross pecuniary loss to someone other than the defendant.

(53) The "reach" of section 113(c)(1) is well illustrated by this provision. Section 103 of the CAA Amendments added, among other provisions, a new section 183(e) which authorizes EPA to issue regulations on control technique guidelines for certain commercial or consumer products in order to control VOC emissions in ozone nonattainment areas. Violation of any "such regulation shall be treated as a violation of a requirement of section 111(e)," and therefore is subject to punishment as a felony. Section 183(e)(6).

(54) CAA sec. 113(c), 42 U.S.C. sec. 7413(c)(1) (1988).

(55) The statute reads "a fine pursuant to Title 18." 18 U.S.C. sec. 3581(b)(6) classifies an offense punishable by not more than one year imprisonment as a "Class A" misdemeanor, which, in turn, results in an authorized fine of not more than \$100,000 under 18 U.S.C. sec. 3571(b)(5).

(56) Senate Report, *supra* note 45, at 363, 543-544. The Senate Report is reproduced in 1991 U.S. Code Cong. & Ad. News only up to p. 488 of the report; p. 489 begins a section entitled "Changes in Existing Law" which reflects such changes via editing marks.

(57) *Clean Air Act Amendments of 1990: Report of the Committee on Energy and Commerce*, H.R. Rep. 490, 101st Cong., 2d Sess. 133-34 (1990) (not reprinted in U.S. Code Cong. & Ad. News).



- (58) Conference Report, *supra* note 38, at 290.
- (59) 136 Cong. Rec. S16971 (daily ed. Oct. 27, 1990) (explanation inserted by Sen. Baucus beginning at S16969). The reluctance is based on sovereign immunity concerns.
- (60) 1 Wharton's Criminal Law sec. 12 (14th ed. 1978 & Supp. 1990); Adamo Wrecking Co. v. United States, 434 U.S. 275, 285; 54 L.Ed.2d 538, 548; 98 S.Ct. 566 (1977). The Environmental Crimes Section, Environment and Natural Resources Division, opines that "it remains unclear" whether the felony or misdemeanor penalty will apply. Dept. of Justice, 1 Environmental Crimes Manual VII-298 (1990). Surprisingly, classification as a misdemeanor or felony has no impact on computation of the sentencing range under the U.S.S.G.
- (61) *Supra* note 52, for computation of fine.
- (62) CAA sec. 113(c)(2), 42 U.S.C. sec. 7413(c)(2) (1988).
- (63) *Supra* note 52, for computation of fine.
- (64) *Supra* note 52, for computation of fine. Section 113(c)(5)(A) also authorizes a fine of not more than \$1,000,000 for organizational defendants, defined at section 113(c)(5)(E).
- (65) 42 U.S.C. sec. 6928(e) (1988).
- (66) 33 U.S.C. sec. 1319(c)(3)(A) (1988).
- (67) Statement of James M. Strock Before the U.S. Sentencing Commission (Feb. 12, 1991) (on file in EPA Office of Criminal Enforcement).
- (68) Breyer & Feinberg, *The Federal Sentencing Guidelines: A Dialogue*, Crim. L. Bull. 5, 8 (Jan.-Feb. 1990). After the first year, one can earn 54 days per year off the sentence. *Id.* and 18 U.S.C. sec. 3624(b).
- (69) 28 U.S.C. sec. 991(a) (1988) and U.S.S.G. Ch. 1, Part A, intro. comment (1).
- (70) 28 U.S.C. sec. 991(b)(1)(A) (1988) and 18 U.S.C. sec. 3553(a)(2) (1988).
- (71) 28 U.S.C. sec. 991(b)(1)(B) (1988).
- (72) 28 U.S.C. sec. 994(o) (1988).
- (73) E.g., Letter from Michael K. Block, Commissioner, U.S. Sentencing Commission, to Gerald Hunt, EPA Office of Criminal Enforcement (Mar. 17, 1986) (requesting data on

criminal enforcement actions), and letter from Michael K. Block and Ilene H. Nagel, Commissioners, to Francis S. Blake, EPA Office of General Counsel (Mar. 27, 1986) (providing sentencing information from the Federal Judicial Center).

(74) Letter from Thomas L. Adams, Jr., EPA Ass't. Administrator, Office of Enforcement, to William W. Wilkins, Jr., Chmn., U.S. Sentencing Commission (Mar. 13, 1987) (available in EPA Office of Criminal Enforcement).

(75) 51 Fed. Reg. 35079-35131 (1986).

(76) *Id.* at 35081, 35110.

(77) *Id.* at 35110.

(78) Letter from Thomas L. Adams, Jr. (Mar. 13, 1987), *supra* note 74, at 2.

(79) 52 Fed. Reg. 3920-3988 (Feb. 6, 1987).

(80) *Id.* at 3960-63.

(81) *Id.* ("Mishandling of Toxic or Hazardous Substances. . ." had a base offense level of 9 compared to the present 8; "Mishandling of Other Pollutants. . ." had the same base offense level of 6 as today.)

(82) 52 Fed. Reg. 18,046 (1987).

(83) Letter from Thomas L. Adams, Jr. (Mar. 13, 1987), *supra* note 74, at attachment, "Comments of Environmental Protection Agency on Revised Draft Sentencing Guidelines (January 1987)." Compare EPA recommendations at p. 2 and 5 of the "Comments" with U.S.S.G. secs. 2Q1.2(b)(2) (draft "imminent danger" standard relaxed to "substantial likelihood"), 2Q1.2(b)(1)(B) (added four-level increase if offense involved any release of hazardous or toxic substance or pesticide), and 2Q1.2, comment (n. 3) (adopting verbatim proposed EPA language on discussion of "toxic" and "hazardous" substances).

(84) 28 U.S.C. sec. 994(a) and (p) (1988); e.g., 53 Fed. Reg. 15,529-36 (1988).

(85) 52 Fed. Reg. 18,080-81 (1987) (reference in sec. 2Q1.3 to petty offense deleted in 1989, U.S.S.G. App. C, amendment 205).

(86) *Sentencing Guidelines for Organizational Defendants*, 48 Crim. L. Rep. 2001 (Oct. 31, 1990); Letter from William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission, to Lee M. Thomas, EPA Administrator (Sep. 19, 1988) (available

in EPA Office of Criminal Enforcement).

(87) Statement of James M. Strock Before the U.S. Sentencing Commission (Feb. 12, 1991); letter from Lee M. Thomas, EPA Administrator, to Ilene H. Nagel, Commissioner, U.S. Sentencing Commission (Oct. 14, 1988) (both available in EPA Office of Criminal Enforcement).

(88) *Justice Department Seeks Alternative to Guidelines From Sentencing Commission*, [21 Current Developments] Env't Rep. 1587 (BNA) (Dec. 21, 1990).

(89) *Commission Excludes Environmental Crimes From Sentencing Guidelines Sent to Congress*, [21 Current Developments] Env't Rpt. (BNA) 11 (May 3, 1991).

(90) U.S.S.G. Ch. 2, intro. comment.

(91) U.S.S.G. sec. 1B1.2(a). However, if the defendant pleads guilty or *nolo contendere*, and stipulates to conduct amounting to a more serious offense, the court applies the section for the more serious offense. *Id.* at comment (n. 1). Even if there is no stipulation, the conduct may be appropriate to consider for application of offense characteristics. *Id.* at comment (n. 3).

(92) *Id.*

(93) *E.g.*, *United States v. Castro*, 908 F.2d 85, 90 (6th Cir. 1990), *United States v. Wilson*, 903 F.2d 648, 654 (9th Cir. 1990), *United States v. McDowell*, 888 F.2d 285 (3d Cir. 1989) (Government); and *United States v. Bogas*, 920 F.2d 363, 369 (6th Cir. 1990) and *United States v. Ocasio*, 914 F.2d 330, 333 (9th Cir. 1990) (defense); but see also, *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990) ("clear and convincing" for departure that increases sentence from 3 years to 30 years). The rules of evidence applicable at trial do not apply to a sentencing hearing, and the sentencing judge may consider any information so long as it has "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. sec. 6A1.3(a), comment, and *Kikumura*, *supra*.

(94) U.S.S.G. sec. 1B1.3(a), comment (n. 1).

(95) *E.g.*, U.S.S.G. sec. 2Q1.2, comment (n. 2) (defining "simple recordkeeping or reporting violation").

(96) U.S.S.G. sec. 1B1.7, comment.

(97) U.S.S.G. sec. 1B1.7; see also Garoppolo, *Confusion and Distortion in the Federal Sentencing Process*, Crim. L. Bull. 3, 4-5 (Jan.-Feb. 1991).

(98) U.S.S.G. sec. 1B1.1(c).

(99) Role of the defendant and obstruction of justice are discussed in more detail *infra* at pp. 34-39.

(100) U.S.S.G. ch. 3, part D, intro. comment.

(101) *Id.* (last para. on p. 3.13); U.S.S.G. sec. 3D1.2(d), comment (n. 6, example 7), and (backg'd).

(102) U.S.S.G. sec. 3D1.3.

(103) U.S.S.G. sec. 3D1.4 and comments (generally, add 1 offense level per group of offenses, depending on seriousness of offense-level in each group).

(104) U.S.S.G. sec. 3E1.1 authorizes a downward adjustment of 2 levels for one who "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." A plea of guilty does not entitle one to the decrease; likewise, one can plead not guilty and still get the decrease, although the latter circumstance would be rare. *Id.*, comment (n. 2). A defendant may not be denied the downward adjustment because he refuses to make self-incriminating statements on conduct in counts to which he plead not guilty and which were dismissed as part of a plea agreement. *United States v. Oliveras*, 905 F.2d 623, 632 (2d Cir. 1990).

The 2-level reduction can be significant, particularly in the lower offense levels. E.g. a reduction from offense level 20 to 18 reduces the sentencing range by about 20 per cent, and a reduction from level 14 to 12 can keep one out of jail altogether. U.S.S.G. ch. 5, part A (Sentencing Table).

(105) U.S.S.G. secs. 1B1.1(e) and (f) and 4A1.3. This could be of great significance for CAA Amendment offenses as is discussed *infra* at pp. 39-42.

(106) U.S.S.G. sec. 5K1.1 authorizes an unlimited downward departure "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation and prosecution of another person who has committed an offense." This is considered independently of any reduction for acceptance of responsibility under sec. 3E1.1. Clearly, this section is quite restrictive in the conditions precedent to its use; nevertheless, it provides great incentive for the attorney to win the "race to the prosecutor" in seeking the best deal for a client. See *United States v. Reina*, 905 F.2d 638, 640 (2d Cir. 1990) (judge may invoke section only on motion of Government).

(107) U.S.S.G. sec. 5H1.10.

- (108) U.S.S.G. sec. 5H1.1 through 1.6.
- (109) Garoppolo, *Downward Departures Under the Federal Sentencing Guidelines*, Crim. L. Bull. 291, 291-92 (Jul.-Aug. 1990).
- (110) 18 U.S.C. sec. 3553(b) (1988); U.S.S.G. sec. 5K2.0.
- (111) U.S.S.G. ch. 1, part A, p. 1.6. This "unguided" departure has been described as "half a loophole" through which much mischief with the U.S.S.G. can be wrought by judges and counsel alike.
- (112) 18 U.S.C. 3742(e) and (f) (1988).
- (113) U.S.S.G. sec. 5E1.2.
- (114) U.S.S.G. ch. 5, part A (Sentencing Table).
- (115) 18 U.S.C. sec. 3742(b) (1988).
- (116) *United States v. Diaz Villafane*, 874 F.2d 43, 48 (1st Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 110 S.Ct. 177, 107 L.Ed.2d 133 (1989); *United States v. Sellers*, 926 F.2d 410 (1991), reh. denied, \_\_\_ F.2d \_\_\_ (5th Cir. 1991) (available Apr. 25, 1991 on LEXIS Genfed library, currnt file).
- (117) U.S.S.G. sec. 5C1.1. Of particular importance is sec. 5C1.1(f) which states that if the minimum term of imprisonment in the guideline range is more than ten months, then the minimum term must be satisfied by a sentence of imprisonment. As draconian as some feel this may be, it is considerably more lenient than the "Proposed" U.S.S.G. (Feb. 1987) which would have made imprisonment mandatory if the minimum term of imprisonment was more than six months. 52 Fed. Reg. 3,978 (1987) (sec. A511(c)).
- (118) U.S.S.G. sec. 2X5.1 and App. A, intro. comment.
- (119) *Id.* and 18 U.S.C. sec. 3553(b) (1988); 18 U.S.C. sec. 3742(f)(2) ("plainly unreasonable" standard on review).
- (120) 33 U.S.C. sec. 1319(c)(2) (1988).
- (121) 42 U.S.C. sec. 7413(c)(1) (1988).
- (122) See also U.S.S.G. App. A, A.11 and A.12 (Statutory Index).
- (123) U.S.S.G. sec. 2Q1.3, comment (backg'd).
- (124) U.S.S.G. sec. 2Q1.2, comment (backg'd).

- (125) 42 U.S.C. sec. 7413(c)(2) (1988).
- (126) See U.S.S.G. App. A., A.12 (Statutory Index).
- (127) U.S.S.G. sec. 2F1.1(b)(1) (e.g., more than \$2,000, add 1; more than \$5,000, add 2; more than \$10,000, add 3).
- (128) U.S.S.G. sec. 2Q1.2, comment (backg'd).
- (129) 42 U.S.C. sec. 6928(e) (1988).
- (130) 33 U.S.C. sec. 1319(c)(3)(A) (1988).
- (131) See U.S.S.G. App. A, A.11 and A.12 (Statutory Index).
- (132) 33 U.S.C. sec. 1319(c)(1) (1988).
- (133) U.S.S.G. sec. 2Q1.3, comment (backg'd).
- (134) U.S.S.G. sec. 2Q1.2(b)(2) and (3) (likelihood of death or serious bodily injury, increase by 9 levels; disruption, increase by 4 levels).
- (135) U.S.S.G. sec. 2A1.4(a)(1) and (2).
- (136) Based on U.S.S.G. ch. 5, part A (Sentencing Table) (assumes no prior criminal history for defendant).
- (137) U.S.S.G. sec. 2A1.2(a).
- (138) U.S.S.G. sec. 2B2.1(a).
- (139) U.S.S.G. sec. 2A2.2(a).
- (140) U.S.S.G. secs. 2T1.1(a) and 2T4.1 (tax table).
- (141) U.S.S.G. sec. 2R1.1(a).
- (142) U.S.S.G. sec. 2F1.2(a).
- (143) U.S.S.G. sec. 2F1.1(a).
- (144) Based on U.S.S.G. sec. 2F1.1
- (145) See U.S.S.G. ch. 1, intro. comment, 1.2-1.3
- (146) *Supra* note 106.
- (147) *United States v. Reina*, 905 F.2d 638, 640 (2d Cir. 1990).
- (148) *Supra* note 20.
- (149) *United States v. Paccione*, 751 F.Supp. 368, 371

- (S.D.N.Y. 1990) (decided on Dec. 22, 1990).
- (150) U.S.S.G. sec. 2Q1.2, comment (n. 5).
- (151) *United States v. Sellers*, 926 F.2d 410 (5th Cir. 1991).
- (152) *United States v. Bogas*, 731 F.Supp. 242 (N.D. Ohio), appeal dismissed mem., 899 F.2d 1222, remanded for resentencing, 920 F.2d 363, 367-68 (6th Cir. 1990). This case will be examined in detail *infra*.
- (153) U.S.S.G. sec. 2Q1.2, comment (n. 6).
- (154) U.S.S.G. sec. 1B1.1, comment (n. 1(j)).
- (155) See CWA sec. 309(c)(3)(B)(iv), 33 U.S.C. sec. 1319(c)(3)(B)(iv) and RCRA sec. 3008(f)(6), 42 U.S.C. sec. 6928(f)(6) (similar definitions of "serious bodily injury").
- (156) U.S.S.G. sec. 2Q1.2, comment (n. 7).
- (157) *United States v. Wells Metal Finishing, Inc.*, 922 F.2d 54, 56-57 (1st Cir. 1991).
- (158) *United States v. Moskowitz*, 883 F.2d 1142, 1153-54 (2d Cir. 1989) (rear section of plane evacuated).
- (159) *Bogas*, *supra* note 152, 920 F.2d at 369.
- (160) U.S.S.G. sec. 2Q1.2, comment (n. 8).
- (161) U.S.S.G. sec. 2Q1.1, comment (n. 1).
- (162) U.S.S.G. sec. 2Q1.2, comment (n. 2).
- (163) U.S.S.G. sec. 2Q1.2, comment (n. 3).
- (164) *Id.*
- (165) U.S.S.G. sec. 3B1.1, comment (n.1).
- (166) *Bogas*, *supra* note 149, 731 F.Supp. at 250.
- (167) *United States v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990).
- (168) U.S.S.G. sec. 3B1.1, comment (n.2).
- (169) *Paccione*, *supra* note 149.
- (170) *United States v. Fuller*, 897 F.2d 1217, 1219-20 (1st Cir. 1990), *United States v. Decicco*, 899 F.2d 1531, 1536

(7th Cir. 1990), *United States v. Carroll*, 893 F.2d 1502, 1509 (6th Cir. 1990); contra, *United States v. Anderson*, 895 F.2d 641 (1990), reh. granted en banc, 911 F.2d 380 (9th Cir. 1991).

(171) The term "Nuremberg defense" derives from the defense of obedience to superior orders unsuccessfully interposed at the Nuremberg war crime trials after World War II. E.g. R. Conot, Justice at Nuremberg 495-96 (1983).

Buried in the definition of "operator" in section 113(h) of the CAA Amendments are two additions to the definition of "person." Each definition is preceded by the phrase "Except in the case of knowing and willful violations, for purposes of. . ."

1) "subsection (c)(4) [negligent endangerment] of this section, the term 'a person' shall not include an employee carrying out his normal activities and who is not a part of senior management personnel or a corporate officer."

2) "paragraphs (1), (2), (3), and (5) of subsection (c) of this section, the term 'a person' shall not include an employee who is carrying out his normal activities and is acting under orders from the employer."

The first difficulty is that the predicate phrase, "Except in the case of knowing and willful violations," could be read to exclude the listed subsections from operation of the limiting definitions, because all of the subsections involve "knowing" violations. Legislative history makes clear this is an improper reading, but it is at least inartfully drawn.

The second problem, assuming one overcomes the drafting problem, is that it is difficult to determine how one can be both "negligent" and "knowing and willful" under section 113(c)(4). Third, each definition contains words and phrases which cry out for definition. What are "normal activities"? What is an "order"? Will there be any presumption of regularity for employer orders? See Manual for Courts-Martial, United States, para. 14c(2)(a) (1984) (lawfulness of order presumed when it relates to a military duty).

Finally, the addition of "willful" may interject a specific intent element not previously contained in most environmental criminal offenses. In the recent case of *Cheek v. United States*, 498 U.S. \_\_\_, 112 L.Ed.2d 617, 111 S.Ct. \_\_\_ (1991), the Supreme Court held that in the context of a prosecution for "willfully" attempting to evade payment of income taxes, the word "willfully means a voluntary, intentional violation of a known legal duty"; hence the Government must prove that the law imposed a duty on the defend-



ant, that the defendant knew of the duty, and that he voluntarily and intentionally violated that duty. *Id.* at 629. This specific intent formulation was necessary because the "proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Id.* at 628. A similar observation might be made about proliferating regulations implementing environmental laws, which one court described as "mind-numbing." American Mining Congress v. EPA, 824 F.2d 1177, 1189 (D.C. Cir. 1987).

Cheek's statutory subject matter, the tax code, is decidedly different from environmental laws, which have traditionally been viewed as public health and safety legislation for which "knowing" has been held to require only proof of general intent. *E.g. United States v. Sellers*, 926 F.2d 410 (5th Cir. 1991) (RCRA offenses).

Legislative history of the CAA Amendments at first indicates that nothing is changed: "This subsection adds several criminal provisions . . . that have not previously been included in the statute. . . . [I]t is our intention that--with the exception only of the crimes of knowing and negligent endangerment--crimes under these new criminal provisions shall be crimes of general intent, rather than crimes of specific intent." 136 Cong. Rec. S16951 (daily ed. Oct. 27, 1990) (Chaffee-Baucus statement of Senate managers) (emphasis added). However, their later discussion of the Nuremberg defense indicates that something beyond the previous "knowing" standard will be required under appropriate circumstances:

A person who knows that he is being ordered to commit an act that violates the law cannot avoid criminal liability for such act by hiding behind such "orders." The "knowing and willful" standard does not require proof by the government that the defendant knew he was violating the Clean Air Act *per se*. It is sufficient for the government to prove that he was committing an unlawful act.

These provisions create a new affirmative defense to criminal actions under certain parts of section 113(c). As such, once the government has satisfied its burden to prove a "knowing" violation in the traditional sense, the burden will shift to the person seeking to claim the defense and the defendant must prove that he was acting under his employer's orders or carrying out normal activities. Only after a defendant has

satisfied that burden will the government be required to prove that the defendant's actions were "willful". . . . For purposes of this section, a plant manager or environmental compliance manager who has been granted broad decisionmaking authority by the owner of the facility shall not be considered to be acting "under" orders.

*Id.* at S1695. At least a shifting of the burden of going forward with evidence is created, and, except in the highly unlikely event "willful" is construed as surplusage, proof beyond the general intent "knowing" standard will be required of the Government. Of no assistance on this issue is the Conference Report, *supra* note 38.

(172) U.S.S.G. sec. 3B1.1, comment (n. 3).

(173) U.S.S.G. sec. 3B1.1, comment (backg'd).

(174) U.S.S.G. sec. 3B1.2, comment (n. 2).

(175) U.S.S.G. sec. 1B1.1, comment (n. 1(f)).

(176) U.S.S.G. sec. 3B1.3, comment (n. 2)(emphasis added).

(177) *United States v. Sharpsteen*, 913 F.2d 59, 62 (2d Cir. 1990).

(178) *United States v. Hummer*, 916 F.2d 186, 191 (4th Cir. 1990) (threatened to sabotage products).

(179) U.S.S.G. sec. 3B1.3, comment (n. 1).

(180) *United States v. Fousek*, 912 F.2d 979, 980 (8th Cir. 1990) (bankruptcy trustee), and *United States v. McElroy*, 910 F.2d 1016 (2d Cir. 1990) (bank official).

(181) *United States v. Drabeck*, 905 F.2d 1304-05 (9th Cir. 1990).

(182) *United States v. Hill*, 915 F.2d 502, 506 (9th Cir. 1990).

(183) *Id.*

(184) An officer in the U.S. Armed Forces takes a commissioning oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic." 5 U.S.C. 3331 (1988).

(185) U.S.S.G. sec. 3C1.2, comment (n. 3).

(186) One pundit observed that one encounters no recidivist environmental offenders, because they're all still in jail.

(187) U.S.S.G. sec. 4A1.3(e).

(188) E.g., CAA Amendments of 1990, Title III (hazardous air pollutants expanded to 189), Title IV (phased reduction of SO<sub>2</sub> emissions for acid deposition control), Title V (major expansion of permit requirement), and Title VI (phaseout schedules and recycling and disposal restrictions on chemicals for stratospheric ozone protection).

(189) E.g., CAA Amendments of 1990, sec. 701 authorizing: administrative orders lasting up to one year (sec. 113(a)(4)), administrative penalty orders up to \$25,000/day with \$200,000 cap (sec. 113(d)(1)), field citation program for minor violations with penalties up to \$5,000/day (sec. 113(d)(3)).

(190) CAA Amendments sec. 113(d)(2)(A) (hearing in accordance with the Administrative Procedure Act, 5 U.S.C. sec. 554 and 556, for penalty order under sec. 113(d)(1)).

(191) CAA Amendments sec. 113(d)(3) (for field citation program such hearing "shall not be subject to" 5 U.S.C. secs. 554 or 556 "but shall provide a reasonable opportunity to be heard").

(192) Cf. *New York v. Mattiace*, 156 A.D.2d, 548 N.Y.S.2d 342 (N.Y.App.Div. 1989), *pet. granted*, \_\_\_ A.D.2d \_\_\_, 555 N.Y.S.2d 40 (1990), *aff'd*, [21 Current Developments] *Env't Rep.* (BNA) 1850 (Feb. 15, 1991) (N.Y. Dec. 27, 1990) (judge did not abuse discretion in trial of owner of family business for possession of forged hazardous waste documents by ruling that the owner could be impeached by prior criminal conviction of the corporate entity).

(193) 136 Cong. Rec. H12861 (daily ed. Oct. 26, 1990) (statement of Rep. Hancock). Cf. Rep. Burton's estimate of 134,000 small businesses. 136 Cong. Rec. H12850 (daily ed. Oct. 26, 1990).

(194) E.g., *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, \_\_\_ U.S. \_\_\_, 113 L.Ed.2d 241 (1991) (inference of willful blindness permitted); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), *cert. denied sub nom. Angel v. United States*, 469 U.S. 1208 (1985) (knowledge inferred based on position within corporation). The CAA Amendments retained the previous definition of "person," renumbered to section 113(c)(6), which includes "any responsible corporate officer." Recall, however, that section 113(h) of the CAA Amendments introduced, for some purposes, a restrictive definition of

"person" which added "willful" to the "knowing" proof requirement, and this cannot help but be a source of confusion (hence, solace to the defense) in future application of the "corporate officer" doctrine for offenses under the CAA Amendments.

(195) *United States v. Gayou*, 901 F.2d 746, 748 (9th Cir. 1990).

(196) *United States v. Montenegro-Rojo*, 900 F.2d 1376, 1377-78 (9th Cir. 1990) (example of "adult criminal conduct not resulting in a criminal conviction").

(197) *United States v. Keys*, 899 F.2d 983, 989-90 (10th Cir. 1990) (departure justified based on prison disciplinary record "which showed several instances of assaultive behavior").

(198) U.S.S.G. sec. 4A1.3 (p. 4.10, 2d para.).

(199) U.S.S.G. sec. 1B1.4; 18 U.S.C. sec. 3661 (1988).

(200) Mr. Mattiace, *supra* note 192, is a good example of when this might be appropriate. His company had previously been convicted of criminal conduct, another conviction had been reversed on appeal, *New York v. Mattiace Industries, Inc.*, 417 N.E.2d 563 (N.Y.App. 1980); and the company had been civilly fined \$130,000 for various hazardous waste violations, *New York Dept. of Env't'l Conservation v. Mattiace Industries, Inc.*, No. 1-1355 (May 23, 1988) (available Apr. 25, 1991, on LEXIS, N.Y. library, Env. file).

(201) *Supra* note 17 (about 13,000 state and Federal administrative actions in FY 1989).

(202) 42 U.S.C. secs. 9601-9656 (1988).

(203) First Brief for the Govt. at 15, *United States v. Bogas*, No. CR88-282 (N.D. Ohio Mar. 1991) [hereinafter cited as First Govt. Brief].

(204) *Supra* note 152.

(205) *Id.*, 731 F. Supp. at 245.

(206) *Id.*

(207) *Id.* at 244.

(208) *Id.*

(209) *Id.*

(210) *Id.*

- (211) *Id.* at 246 (Bogas denied saying this).
- (212) *Id.*
- (213) *Id.* at 250.
- (214) *Id.*
- (215) *Id.*
- (216) *Id.* at 247.
- (217) *Id.*
- (218) *Id.* at 245.
- (219) *Id.* at 246.
- (220) *Id.*
- (221) U.S.S.G. sec. 6A1.3.
- (222) *Bogas, supra* note 152, 731 F. Supp. at 244.
- (223) *Id.* Since the parties agreed to the grouping, the judge did not explain why she skipped the steps in U.S.S.G. secs. 1B1.1(b) and 1B1.1(c), which require determination of base offense levels and adjustments for each count before "grouping" according to the most serious. A quick perusal of the U.S.S.G. for the false statement count (sec. 2F1.1) and CERCLA count (sec. 2Q1.2) reveals what was obvious to the parties: the false statement base offense level is only six and its offense characteristics had no relevance to Mr. Bogas' conduct; however, the CERCLA offense characteristics were relevant and could result in substantial enhancement of the base offense level.
- (224) *Bogas, supra* note 152, 731 F. Supp. at 247-48.
- (225) The government apparently concluded that a 4-level upward adjustment was not appropriate based on U.S.S.G., sec. 2Q1.2, comment (n. 7): "Subsection (b)(3) provides an enhancement where . . . cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted." 920 F.2d 363, 369 (6th Cir. 1990).
- (226) *Bogas, supra* note 152, 731 F. Supp. at 248.
- (227) *Id.* at 248-49.
- (228) *Id.* at 249.

- (229) *Id.* at 250.
- (230) *Id.*
- (231) A bulldozer operator, acting head of field maintenance, two crew foremen, and six crew members. 731 F. Supp. 242, 250.
- (232) Recall that one need not have been convicted to be "criminally responsible." U.S.S.G., sec. 3B1.1, comment (n. 1).
- (233) *Bogas*, supra note 152, 731 F. Supp. at 250.
- (234) *Id.* at 250-51.
- (235) *Id.* at 251.
- (236) *Id.* at 252.
- (237) *United States v. Avila*, 905 F.2d 295, 298 (9th Cir. 1990) (not cited in *Bogas* sixth circuit decision or in Government or defense briefs on remand).
- (238) *Bogas*, supra note 152, 731 F.Supp. at 252.
- (239) *Id.* at 253.
- (240) *Id.* at 244.
- (241) *Bogas*, supra note 152, 920 F.2d 363.
- (242) *Id.* at 368.
- (243) *Id.* at 368. The sixth circuit, while proclaiming its neutrality, pointed out that U.S.S.G. sec. 2Q1.2, comment (n. 5) authorizes a decrease of two levels depending "upon the harm resulting from the release." In the alternative, the sixth circuit opined that a downward adjustment might be based on "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" under U.S.S.G. Ch. 1, Part A, intro. comment, 1.6-1.7.
- (244) *Bogas*, supra note 152, 920 F.2d at 359.
- (245) *Id.* at 365. Neither opinion discussed testimony that after he received the first call from the fire department, *Bogas* told his field manager, "We have a big problem. We are in trouble," and then ordered the manager to "Make sure the next load is clean." First Govt. Brief at 10-11.
- (246) *Bogas*, supra note 152, 920 F.2d at 365.

- (247) U.S.S.G. Ch.5, Part A.
- (248) U.S.S.G. sec. 5C1.1, comment (n. 8).
- (249) *Bogas*, supra note 152, 920 F.2d at 364.
- (250) *Id.* at 365, 368.
- (251) *Bogas*, supra note 152, 731 F. Supp. at 246.
- (252) *Bogas*, supra note 152, 920 F.2d at 369.
- (253) Von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 Am. Crim. L.R. 367, 375-79 (1989).
- (254) Dept. of Justice, 1 Environmental Crimes Manual IV-8 (1990).
- (255) Starr & Kelly, *Environmental Crimes and the Sentencing Guidelines: The Time Has Come ... and It Is Hard Time*, [20 News & Analysis] Env'tl. L. Rep. (Env'tl. L. Inst.) 10096, 10104 (Mar. 1990).
- (256) *The Federal Sentencing Guidelines: A Dialogue*, Crim. L. Bull. 5, 19 (Jan.-Feb. 1990).
- (257) 28 U.S.C. sec. 994(m) (1988).
- (258) Starr & Kelly, *Environmental Crimes and the Sentencing Guidelines: The Time Has Come ... and It Is Hard Time*, [20 News & Analysis] Env'tl. L. Rep. (Env'tl L. Inst.) 10096 (Mar. 1990).
- (259) Dept. of Justice, 1 Environmental Crimes Manual IV-9 (1990).
- (260) *Id.* A poll of all U.S. district court judges revealed they were spending between 25 and 100 per cent more time in sentencing hearings and guilty plea proceedings as a result of the U.S.S.G. *Courts Study Committee Recommends Changes in Federal Judicial System*, 46 Crim. L. Rep. (BNA) 1389 (1990). The district court judges also wanted the U.S.S.G. made advisory only. *Id.*
- (261) *Bogas*, supra note 152, 731 F. Supp. at 244.
- (262) Dept. of Justice, 1 Environmental Crimes Manual IV-5 (1990).
- (263) *Id.* at IV-5 to IV-8.
- (264) U.S.S.G. sec. 5F1.5(a).

(265) U.S.S.G. sec. 5F1.5(b). Even if not imposed as a condition of probation, an employing company with meaningful government contracts may feel pressure to dismiss an employee who has run afoul of CAA Amendment criminal provisions in order to distance itself from the employee and therefore demonstrate its business integrity. See proposed Federal Acquisition Regulation sec. 9.406-1, providing examples "that should be considered when evaluating whether a contractor's debarment is warranted" (including whether disciplinary action has been taken against responsible individuals and whether the contractor has eliminated the circumstance within his organization which led to the cause for debarment). 55 Fed. Reg. 50,152 (1990).

(266) Pub. L. No. 101-549, 104 Stat. 2682, sec. 705 (amending Clean Air Act sec. 306(a)) (mandatory bar). See Federal Acquisition Regulation sec. 9.406-2, "Causes for debarment," subsecs. (a) (4) and (c) (debarment based on conviction for "offense indicating lack of business integrity or business honesty" and debarment based on preponderance of evidence for "any cause of so serious and compelling a nature that it affects the present responsibility"); sec. 9.407-2, "Causes for suspension" (based on "adequate evidence" for reasons similar to debarment).

(267) E.g., Ohio Rev.Code. Ann. sec. 3734.40-.47.(Baldwin 1988).

(268) Pub. L. No. 101-647, 104 Stat. 4835, sec. 1404 (1990) (amending 18 U.S.C. sec. 1956(c)(7)).

(269) 18 U.S.C. sec. 1956(a)(1) through (3).

(270) First Govt. Brief at 17.

(271) First Govt. Brief at 21.

(272) First Govt. Brief at 17-18.

(273) First Govt. Brief at 17-18.

(274) One of Mr. Bogas' sentencing submissions is a letter on his behalf from the Governor of Ohio. Telephone interview with Gregory C. Sasse, Ass't U.S. Attorney (N.D. Ohio) and prosecutor in *United States v. Bogas* (Apr. 3, 1991).

(275) Second Brief for the Govt. at 2-3, *United States v. Bogas*, No. CR88-282 (N.D. Ohio) [hereinafter cited as Second Govt. Brief].

(276) *Id.* at 7.

(277) U.S.S.G. ch. 5, part A (Sentencing Table), and sec. 5C1.1(f).



- (278) Second Govt. Brief at 8.
- (279) Telephone interview with Gregory C. Sasse, Assistant U.S. Atty. (N.D. Ohio) and prosecutor in *U.S. v. Bogas* (Apr. 3, 1991).
- (280) Quoted in Congressional Research Service, Respectfully Quoted 191 (1989).
- (281) Schulhofer & Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L.R. 231, 260-263.
- (282) Council on Environmental Quality, 1989 Environmental Quality Report 144 (1990); see Stewart, *Enforcing the Laws of Justice, Defending the Laws of Nature*, Federal Bar News & J. 38, 39 (Jan./Feb. 1991).
- (283) Cf. Judge: *The Powerful Deterrent of a Prison Term is Required*, Washington Post, Nov. 23, 1990, at B12, col. 2 (judge's comments during sentencing of Michael Milken for financial crimes: "subtle crimes . . . unlikely to be detected").
- (284) First Govt. Brief at 7.
- (285) Quoted in Congressional Research Service, Respectfully Quoted 178 (1989) (from Feb. 13, 1913 speech in New York City).
- (286) Mr. Capone was a Chicago gangster in the 1920's; quote is widely attributed to him, but source unknown.
- (287) M. Pickthall (trans.), The Meaning of the Glorious Koran 34 (Mentor Books, N.Y.).
- (288) *Supra* note 89.